TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 633.

GREAT LAKES DREDGE AND DOCK COMPANY, PLAINTIFF IN ERROR,

vs.

SOPHIA KIEREJEWSKI, AS ADMINISTRATRIX OF THE PERSONAL ESTATE OF LEO KIEREJEWSKI, DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

FILED OCTOBER 2, 1922.

(29,183)

(29,183)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 633.

GREAT LAKES DREDGE AND DOCK COMPANY, PLAINTIFF IN ERROR,

vs.

SOPHIA KIEREJEWSKI, AS ADMINISTRATRIX OF THE PERSONAL ESTATE OF LEO KIEREJEWSKI, DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Record from the U. S. district court for the western district of New York	2	1
Clerk's certificate	2	1
Amended complaint	3	1
Answer to amended complaint	8	6
Minute entries	13	10
Bill of exceptions	15	11
Testimony of Edward H. Thomas	15	12
Joseph W. Busch	21	16
Edward Zagoda	27	20
Frank Caffey	28	21
Sophia Kierejewski	29	21
Matthew W. Bennett	30	22
John A. Gladkowski	31	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1922.

	Original.	Print.
Motion for nonsuit and order thereon	32	23
Testimony of Bert J. Wahl	33	24
Jeremiah J. Murphy	33	24
Robert Stoyle	42	30
Josefus A. La Croix	47	34
Charge of the court	50	36
Plaintiff's exceptions	60	42
Defendant's exceptions	60	42
Verdict	61	42
Motion to set aside verdict and for a new trial	61	43
Order overruling motion	61	43
Order settling bill of exceptions	62	43
Notice of judgment	63	44
Judgment	64	44
Memorandum: Hazel, J., denying motion for new trial	66	46
Assignment of errors	67	47
Order allowing writ of error and fixing bond	69	48
Writ of error	70	49
Certified question for review	71	50
Prayer for reversal	72	51
Citation and service	73	51
Stipulation as to transcript	74	52
Designation of parts of record to be printed and consent thereto	75	53

1 & 2 UNITED STATES OF AMERICA,
Western District of New York, ss:

I, Harris S. Williams, Clerk of the District Court of the United States of America for the Western District of New York, do hereby certify that the annexed seventy-four written and printed pages, numbered from 1 to 74, inclusive, have been stipulated by the attorneys of the parties to be a true transcript of the record on writ of error from the United States Supreme Court to review a judgment of the United States District Court for the Western District of New York in the action in said District Court entitled Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff, vs. Great Lakes Dredge & Dock Co., Defendant, and I do certify the same to be the transcript of record on said review.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of September, A. D. 1922.

[Seal of United States District Court, Western District of New York.]

HARRIS S. WILLIAMS,
Clerk.

3 1. *Amended Complaint.*

United States District Court, Western District of New York.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff,

vs.

GREAT LAKES DREDGE & DOCK COMPANY, Defendant.

And now comes the plaintiff in the above entitled action appearing by Matthew W. Bennett, her attorney, and for her causes of action against defendant, and as and for an amended complaint and declaration, alleges:

First.

1. For her first cause of action against defendant plaintiff alleges that the above named defendant, Great Lakes Dredge & Dock Company, is, and was during all the times herein mentioned, as plaintiff is informed and believes, a foreign corporation, organized and existing under the laws of the state of New Jersey, having an office for the transaction of business in the City of Buffalo, New York, engaged in the business of dredging and dock building at the city of Buffalo, New York, and other places.

2. That heretofore and on the 21st day of April, 1919, defendant in the transaction of its business was engaged in repairing a steel scow belonging to said defendant. That said scow was located in the Buffalo Creek at the foot of Katharine Street in the city of Buffalo, New York, within a few feet of the dock.

That for the purpose of doing said repairs to said scow defendant had erected a wooden scaffold about sixteen feet long along the outside of the scow, one end of said scaffold resting on and being nailed and fastened to a horse which in turn rested on a small float, and the other end of said scaffold resting on and being nailed and fastened to a pile driver which was two or three feet northwest of the scow and about ten or fifteen feet away from the dock, said pile driver being there for the purpose of facilitating the work of repairing the scow.

4 That about four o'clock in the afternoon of said April 21st 1919, deceased was engaged in said work of repairing said scow as defendant's employee and was the only man on the scaffold at the time. That a tug belonging to said Great Lakes Dredge & Dock Company, the defendant herein, came down the Buffalo Creek from the northwest, without a tow, and when said tug was near the southeast end of said scow it stopped and backed up toward the pile driver, coming within a few feet of said float upon which rested the horse to which said scaffold was fastened. That when said tug backed up the propeller of said tug made a great commotion in the water causing waves to start from the propeller each way, some of them toward the float. That these waves so agitated and rocked the float that the planks fastened to the horse were torn loose and deceased was thrown into the water and killed. That no warning of any kind was given to deceased.

Plaintiff further alleges that the work of repairing said scow, the scow itself, the pile driver, the float, and the tug all belonged to said defendant and were under the charge and superintendence of J. J. Murphy the superintendent of the defendant.

That the defendant was negligent and careless in that it failed to perform its duty toward deceased of furnishing him a safe place to work, and also in that it failed to give deceased any warning of the approach of said tug near said float and said scaffold or of the action of said propeller in thus moving said float, causing said scaffold to break loose from its fastenings and throwing deceased into the water thus causing his death.

Plaintiff further alleges that the death of her intestate was caused solely by the negligence of said defendant in the respects above mentioned.

3. Plaintiff further alleges that as a result of said accident decedent died on the 21st day of April, 1919, and thereafter and on the 7th day of March, 1921, after due process had in the Surrogate Court of Erie County, plaintiff was duly appointed administratrix of the estate of Leo Kierejewski, deceased, and letters of administration were duly granted and issued to her by said Surrogate and she

thereupon duly qualified as such administratrix and ever since has been, and now, is acting as such.

4. Plaintiff further alleges that said intestate left him surviving this plaintiff, Sophia Kierejewski, his wife, and two children, a son five years of age and a daughter three years of age, as his sole heirs and next of kin entitled to receive any and all damages.

5. Plaintiff further alleges that said intestate was in perfect health and able to work every day, steady in his habits and at his work, and was at the time, and had been for some time previous to the accident, earning $6.40 a day or $1,996.80 annually, which sum was used for the support, maintenance and education of said family; that by reason of said death of said intestate so caused by the negligence of said defendant, and, therefore, by reason of the negligence of the defendant, plaintiff and said family, are, and have been, damaged in the sum of Fifty Thousand Dollars ($50,000.00).

6. Plaintiff further alleges on information and belief that said intestate at the time of his death was engaged in work and employment of a different character from the work and employment of the operatives of said vessel or tug which by its negligent operation so disturbed the waters as to upset the scaffold upon which intestate was standing, throwing him into the water *caus*ing him to be drowned, and under a different foreman or superintendent.

7. Plaintiff further alleges that this cause of action accrued to plaintiff within two years next preceding the commencement of this action within the provisions of the Code of Civil Procedure of the State of New York. That decedent died as a result of defendant's negligence on April 21st, 1919. That previous to the expiration of two years after decedent's death, and on the 16th day of April, 1921, the plaintiff caused a summons in this action to be delivered to the Sheriff of Erie County where defendant resides and where said accident occurred, at his office in the City of Buffalo, New York, with bona fide intent on the part of plaintiff that it should be actually served and with directions to said Sheriff to serve said summons on defendant, and pursuant to such delivery and directions said summons was actually served on defendant on May 25, 1921. That said summons was served on defendant by being delivered to Samuel Dark, vice-president of defendant, at the City of Buffalo, New York. That said Samuel Dark resides, and then resided in the City of Buffalo, New York, and during all of said times the defendant kept an office in said City of Buffalo, County of Erie, New York, for the transaction of its business and transacted its general business in said city and county and was so transacting the same at the time of said accident and death of intestate which occurred in the county of Erie. That said summons was so delivered with such intent and direction and the part of plaintiff and was subsequently served by said Sheriff on defendant as specified and required by Section 399 of the Code of Civil Procedure of the State

of New York, and within sixty days after the expiration of the time limited for the actual commencement of the action by the personal service thereof upon the defendant. That said facts constitute an attempt to commence an action in a court of record, equivalent to the commencement thereof against defendant within the meaning of the provisions of the Code of Civil Procedure of the State of New York, including the two year statute of limitations in death cases contained in Section 1902 of said Code of Civil Procedure.

8. Plaintiff further alleges on information and belief that at the time said accident and drowning of said intestate occurred, said intestate was engaged in work of a maritime nature as was also the defendant, the master of said intestate, by whom said intestate was employed and for whom he was working, and the said work and functions being performed by both said intestate and said defendant, and the said negligent of said defendant causing the death of intestate were in maritime waters, and said negligent acts and wrongs of defendant so causing the death of plaintiff's intestate constitute, as plaintiff is informed and believes, a maritime tort or maritime torts.

Second.

For a second and separate cause of action against the defendant, plaintiff further alleges:

9. Plaintiff realleges all the allegations set forth hereinbefore in said first cause of action, and further alleges on information and belief, that the said intestate at the time of his said death, and while so employed in work, labor and services as defendant's servant was a seaman under the maritime law and under the statutes of the United States, and that the rules of maritime law applied, and now apply, to and govern the relations of the defendant to said intestate and all questions arising in this case out of the relations of defendant and intestate to each other, and out of the character of the employment of intestate to the work defendant and intestate were engaged in.

10. Plaintiff further alleges on information and belief that the said intestate at the time of said accident and death and in the employment of intestate and the work both intestate and defendant were engaged in, was a seaman within the meaning of section 20 of the Act of Congress of March 4, 1915, as amended by the Act of Congress of June 15, 1920, and that therefore all the statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees
7 apply. That is intestate and this case come under the Federal Employers' Liability Act. That plaintiff brings this action as the personal representative of such intestate seaman and has elected to maintain this action for damages for said death under Section 20 of the statutes of the United States so made applicable with the right of trial by jury.

11. Plaintiff further alleges that this action is brought in the District Court of the United States in the district in which the defendant's employer's principal office is located and where said accident and death occurred and where defendant was engaged in its general business at the time, and where, as plaintiff is informed and believes, defendant resided.

12. Plaintiff further alleges that no administrator or personal representative of intestate was appointed and none acted as such until March 7, 1921, when plaintiff, after due process of law in the Surrogate's Court of Erie County where intestate resided at the time of his death, letters of administration were duly granted and issued to plaintiff by said Surrogate's Court and she thereupon duly qualified as such and ever since has been, and now is, acting as such.

13. Plaintiff further alleges on information and belief, that this cause of action accrued within two years next preceding the time of the commencement of this action that two years have not elapsed since said cause of action accrued. That said cause of action accrued, as plaintiff is informed and believes, on March 7th, 1921, when plaintiff was appointed and commenced to act as the administratrix and personal representative of said intestate, that being the first appointment of any such administratrix or personal representative. That this action was commenced by delivery of the summons into the hands of the Sheriff of Erie County as hereinbefore alleged on April 16, 1921, and by the service of said summons on defendant on May 25th, 1921, as hereinbefore alleged and set forth.

14. Plaintiff further says that she has been damaged in the premises in the sum of Fifty Thousand Dollars ($50,000).

Wherefore, plaintiff demands judgment against defendant in the sum of Fifty Thousand Dollars ($50,000.00), besides the costs of this action.

MATTHEW W. BENNETT,
Attorney for Plaintiff.

Office and P. O. Address, 710 Ellicott Sq., Buffalo, N. Y.

[Endorsed:] Civ. 2127. United States District Court for Western District of N. Y. Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff, vs. Great Lakes Dredge & Dock Co., Defendant. Amended Complaint and Declaration. Matthew W. Bennett, Attorney for Plaintiff, 710 Ellicott Square, Buffalo, N. Y. Filed Nov. 1, 1921. Harris S. Williams, Clerk.

Personal service is hereby admitted of a copy of the within.

ULYSSES S. THOMAS,
Defendant's Attorney.

Dated Oct. 28, 1921.

8 *2. Answer to Amended Complaint.*

District Court of the United States for the Western District of New York.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff,

against

GREAT LAKES DREDGE AND DOCK COMPANY, Defendant.

The defendant, by Ulysses S. Thomas, its attorney, for its answer to plaintiff's amended complaint and declaration:

For its answer to plaintiff's alleged first cause of action,

First. Admits the allegations contained in paragraph or subdivision numbered 1 thereof.

Second. Admits that, at the time and place alleged in said complaint, the defendant in the transaction of its business was engaged in repairing a steel scow belonging to it and that said work was under the charge and supervision of its superintendent, J. J. Murphy, and that deceased, then and there, was in its employ and met with an accident which resulted in his death.

Third. Denies that it has any knowledge or information sufficient to form a belief as to the details of the manner in which said work was being done at the time of the alleged accident.

Fourth. Upon information and belief, denies the allegation "that no warning of any kind was given to deceased."

Fifth. Upon information and belief, denies each and every allegation of negligence on the part of the defendant contained in said complaint.

Sixth. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs or subdivisions of said complaint numbered 3 and 4.

Seventh. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraph or subdivision thereof numbered 5 not hereinbefore specifically admitted or denied except the allegation that said plaintiff's intestate, at the time of and for some time prior to the alleged accident, was earning $6.40 per day.

9 Eighth. Denies each and every allegation contained in the paragraph or subdivision thereof numbered 7, except the allegations that decedent died on April 21, 1919, that the summons in this action was actually served on defendant on May 25, 1921, by being delivered to Samuel Dark, vice-president of defendant, at the City of Buffalo, New York, that said Samuel Dark resides and then

resided in said City of Buffalo, and that, during all of the times mentioned in said complaint, the defendant kept an office in said City of Buffalo, County of Erie, New York, for the transaction of its business and transacted its general business in said city and county and was so transacting the same at the time of said accident which occurred in the County of Erie.

For its answer to plaintiff's alleged second and separate cause of action,

Ninth. Repeats each and every denial contained in its answer to plaintiff's alleged first cause of action.

Tenth. Denies each and every allegation contained in the paragraph or subdivision numbered 9 of plaintiff's alleged second and separate cause of action, except the allegations hereinbefore specifically denied.

Eleventh. Denies each and every allegation contained in the paragraph or subdivision thereof numbered 10.

Twelfth. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraph or subdivision thereof numbered 13 and 14.

Thirteenth. Denies each and every allegation contained in the paragraph or subdivision thereof numbered 13, except the allegation that the summons in this action was served on the defendant on May 25, 1921.

For a second separate and further answer and defense to said amended complaint and declaration and the alleged causes of action therein contained, the defendant alleges upon information and belief:

Fourteenth. That any injuries sustained or suffered by plaintiff's intestate at the time and place, or on the occasion mentioned in the complaint, were caused in whole or in part, or were contributed to by the negligence and want of care of the plaintiff's intestate and not by any negligence or fault or want of care on the part of defendant.

For a third, separate and further answer and defense to said amended amended complaint and declaration and the alleged causes of action therein contained, the defendant alleges upon informatoin and belief:

Fifteenth. That the accident and resultant death of plaintiff's intestate, as set forth in said complaint, were caused or contributed to by the negligence of said intestate and that if any negligence other than the negligence of said intestate caused or contributed to cause said accident and resultant death, it was the negligence of a competent fellow-servant or fellow-servants then in the service of the defendant with said intestate.

For a fourth separate and further answer and defense to said amended complaint and declaration and the alleged causes of action

therein contained, the defendant alleges upon information and belief:

Sixteenth. That the accident and resultant death as set forth in said complaint occurred while plaintiff's intestate was at work in an employment into which he had voluntarily entered, knowing the hazard thereof and accepting and assuming the same by entering into and continuing in such work.

For a fifth, separate and further answer and defense to said amended complaint and declaration and the alleged causes of action therein contained, the defendant alleges upon information and belief:

Seventeenth. That the defendant is a foreign corporation, organized under the laws of the State of New Jersey; that pursuant to the statute in such case made and provided, by an instrument in writing under the seal of the defendant corporation and duly executed, accompanied by the written consent of the person designated, and duly filed in the office of the Secretary of State of this State in the year 1914, the defendant duly designated William H. Kennedy as a person upon whom personal service of a summons in any action brought against the defendant might be made; that said designation specified 718 White Building, in the City of Buffalo, a place within the State of New York, as the office of the person designated as aforesaid; that said designation is and continuously since the said year 1914, has been in full force and unrevoked, and the place specified as the office of the said person so designated is and con-
11 tinuously since the said year 1914, has been unchanged; that the cause or causes of action set forth in said complaint did not accrue to the plaintiff herein within two years next preceding the commencement of this action.

For a sixth, separate and further answer and partial defense to said complaint and declaration and the alleged causes of action therein contained, the defendant alleges upon information and belief:

Eighteenth. That, at all the times mentioned in said amended complaint and declaration, defendant conducted the business of dredging and dock building in the State of New York and that plaintiff's intestate, at the time of his alleged death, was engaged in defendant's employment in one of the occupations enumerated in section two of the New York Workmen's Compensation Law; that defendant, prior to said alleged death, had duly complied with the provisions of said Workmen's Compensation Law for securing payment of compensation to any and all of its employees who might sustain injury, and their dependents, by insuring and keeping insured the payment of said compensation with the Employers' Liability Assurance Corporation, Ltd. of London, England, which is a stock corporation, duly authorized to transact the business of workmen's compensation insurance in this State, and had duly and, upon obtaining such insurance, forthwith filed with the Workmen's Compensation Commission a notice specifying the name of such corpora-

tion together with all such information regarding the policies as said Commission required; that, after the death of plaintiff's intestate, a regular hearing after due claim filed and notice of same given, was had in this matter before the State Industrial Commission at Buffalo, New York; that said Commission, in the month of May, 1919, made an award of $100.00 for the funeral expenses of said decedent and a further award of compensation to his widow and two surviving children; that said insurance carrier has paid the $100.00 funeral expenses so awarded, and has also paid the further sum of $945.68 as part of the compensation so awarded to said widow and surviving children.

For a seventh, separate and further answer and defense to plaintiff's alleged second cause of action, the defendant alleges:

Nineteenth. That the injuries alleged therein were sustained and plaintiff's intestate died on April 21, 1919; that the Act of
12 Congress of June 5, 1920, therein set up, does not apply to a case of death occurring before said June 5, 1920; that, if it does apply to such a case of death, it is void and unconstitutional because it violates the Fifth Amendment of the Constitution of the United States of America.

Wherefore, defendant demands judgment dismissing said complaint, with costs.

ULYSSES S. THOMAS,
Attorney for Defendant.

715 White Building, Buffalo, N. Y.

[Endorsed:] United States District Court, Western District of New York. Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff, against Great Lakes Dredge and Dock Company, Defendant. Answer to Amended Complaint. Ulysses S. Thomas, Attorney for Defendant, 719 White Building, Buffalo, N. Y. Filed Sept. 15, 1922. Harris S. Williams, Clerk.

13 3. *Clerk's Minutes.*

December 16, 1921.

Civil #2127.

Re SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased,

vs.

GREAT LAKES DREDGE & DOCK COMPANY.

Appearances:

For plaintiff, Matthew W. Bennett, Irving L. Cole.
For defendant, Ulysses S. Thomas.

Case moved by plaintiff's attorneys.
Ordered that a jury be empanelled herein and that the trial of this action do now proceed.

Whereupon the following jurors were called and sworn:

1. Fred W. James.
2. Albert H. Dodge.
3. Charles J. Geyer.
4. Thomas W. Mahoney.
5. Louis Braun.
6. E. Guy Durkee.
7. Charles J. Kolb.
8. William J. Hauck.
9. Frank L. Gardner.
10. Philip D. Stein.
11. George L. Hulglander.
12. Edward M. Warner.

Mr. Cole here opens the case to the jury for the plaintiff.
Witnesses for plaintiff, Joseph W. Busch, Edward H. Thomas, Frank Coffey, Edward Zgoda, Matthew Bennett, Sophia Kierejewski.
Plaintiff rests.
Counsel for defendant asks for dismissal on both causes of action.
Denied in both. Exceptions.
Counsel for deft. moves that plaintiff elect on which cause case to go to jury. Decision held.
Counsel for deft. moves to dismiss on ground that amendment to Merchants' Seamen's Act not retroactive. Denied. Exception.

Clerk's Minutes.

December 19, 1921.

Civ. #2127.

SOPHIA KIEREJEWSKI, as Administratrix, etc.,

vs.

GREAT LAKES DREDGE & DOCK COMPANY.

Same appearances. Trial resumed.

14 Motion to dismiss second cause of action granted.

Witnesses for defendant: Bert J. Wall, Josephus A. La Croix, Frank C. Hibbard, Jeremiah J. Murphy, Robert Stoyle.

Defendant here rests.

Plaintiff here rests.

Defendant's counsel here renews Motion for a dismissal of the first cause of action. Denied and exception.

Mr. Thomas here sums up the case for the defendant.

Mr. Cole here sums up the case for the plaintiff.

The Jury after listening to a charge from his honor the Judge, retire at 1:05 P. M. in the custody of sworn officers to deliberate upon their verdict.

The Jury here come into Court at 3:15 P. M. and say they find a verdict for the plaintiff for $11,954.32.

Defendant's counsel here moves for a new trial. Held.

15 United States District Court, Western District of New York.

At Law.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff,

vs.

GREAT LAKES DREDGE & DOCK COMPANY, Defendant.

1. *Bill of Exceptions.*

Be it remembered that on the trial of this cause before the Hon. John R. Hazel, Judge of the United States District Court for the Western District of New York and a jury, at the March term, 1922, the following proceedings were had and taken.

A jury was impaneled and sworn according to law and thereupon the plaintiff to sustain the issue upon her part offered the testimony of the following witnesses as her evidence in chief:

EDWARD H. THOMAS, being duly called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Cole:

I live at 231 Roland Avenue, Lackawanna and am a boiler maker by occupation. In some places it is nothing but repairing boilers and in other places it is doing all kinds of iron work. Don't construct boilers where I am. They do in boiler shops. I am qualified to do all kinds of iron work. On the 21st day of April, 1919, I was an employee of the defendant Great Lakes Dredge & Dock Company and had been in its employ then about six or eight months; was employed as a boiler maker's helper and my work consisted of work on the defendant's boats, repairing stacks, repairing boilers, working in the yard or any work that I might be put at; I
16 was working and had been working on a scow at the foot of Katherine Street in the Buffalo Creek for about three weeks in April, 1919, as helper off and on to Leo Kierejewski, who was a boiler maker working on that boat. He had been working there all the time that I was there. Our foreman was Bob Stoyle; he hired me and hired and discharged the help; before we began repairing the scow it had been used by the defendant for hauling mud but had been laid up for repairs; Kierejewski's regular pay was $6.40 a day of eight hours, or eighty cents an hour, with double pay for overtime. There was quite a bit of overtime. On the 21st of April, 1919, we had been working on the outside of the scow putting a patch on th eoutside corner towards the Lake; the scow was lying at the dock and had slightly rounding corners and was 145 feet long. Kierejewski was standing on a scaffold built on a float alongside the scow; there was a horse nailed on the float and near by a pile driver a little lower than the scow; the pile driver projected out into the river eight or ten feet beyond the scow; the horse on the float was about four feet high and there were two planks nailed to the horse extending over to the deck of the pile driver; we stood on those planks when we did our work; the float was about twenty feet long and was constructed of 3x12 planks with cross pieces and simply floated in the water; the horse was fastened to the float by being nailed on and the planks were nailed on to the horse and also nailed on to the pile driver; the float and scaffold was at the outside and downstream corner of the scow; we had used that float before and it had been at that place for a week; navigation was open at that time and vessels were passing up and down the Creek; it was wide enough for vessels to do that; their wash did not disturb the float to any great extent, not enough so that we would have to get off of it; up to the 21st nothing had happened with that float or scaffold; on the 21st Kierejewski was on the scaffold chipping and caulking the corner of the
17 scow and then painting it where some new iron work had been put on; Bush and several others had been working

there also; after the iron was put on it was caulked by Kierejewski and then it was painted by him; while he was caulking and painting there was no one else on the scaffold; when the accident happened I was on the dock about forty feet from the scaffold; Kierejewski was on the scaffold; Stoyle was on the deck of the scow a couple of feet from the scaffold and I was just coming back from the shanty where we kept our tools and clothes; I got down alongside of the scow on the dock and I saw a tug coming up the creek; it went to the upper end of the mud scow and then started to back in; as it went past the pile driver and the scow going up it was about in the middle of the creek and when it got up to the end of the scow it started to back up towards the scow and towards the float; it backed strong; I watched it as it came up there; I did not see anybody on the deck; from what I could see I would say that it got within eight or nine feet of the float; at that time Stoyle was on the end of the scow alongside the float and Kierejewski was working right at the corner of the scow; when the tug came up the creek and went by I did not hear anybody talk or holler to anybody else, nor did I hear anything said between anybody on the scow until they backed up close; the tug came back and the scaffold collapsed; I did not see any disturbance in the water but I saw the scaffold when it collapsed and had a glimpse of Kierejewski as he went down; I saw the tug back up to within eight or nine feet of the float and I saw it give a kick ahead; the planks that were fastened to the pile driver fell apart and went down and Kierejewski went down between the pile driver and the scow; he did not come up any more; it was about forty five minutes after that that his body was recovered; I helped to take him out; he was dead; I did not hear Stoyle say anything to
18 Kierejewski at all before the scaffold collapsed.

Cross-examination.

By Mr. Thomas:

The horse was right about the center of the float and extended across the whole float; the planks ran over the horse a foot or two and were close together; I helped to do the work of fastening the horse on the float, myself and Bush and some others; it was done by the men under Stoyle; I don't recall whether Kierejewski was one of them, I don't believe he was; the planks were fastened to the pile driver with spikes about five or six inches long and to the horse with similar nails and the horse was fastened to the float with similar nails; it was a good job; I do not know of any other way of fastening it; it was the usual way in this port; the float had been in use on that scow for about three weeks; about two weeks on another part of the scow and about a week on this part; my work was that of a boiler maker's helper and my job was to help the boiler maker, whatever he does; a boiler maker's helper repairs boilers, repairs ships; boats, dredges, scows.

Q. The Great Lakes Dredge & Dock Co. doesn't operate a ship does it?
A. You call the tug a ship?
Q. That is all there is to the ships?
A. Yes.
Q. They have got some pile drivers?
A. Yes.
Q. And equipment for that work?
A. Yes sir.
Q. And for dredging?
A. Yes sir.
Q. Around the creek and harbor?
A. Yes.

a boiler maker's helper does plat work of all kinds and whatever there is that has to be done.

Q. On land or water?
A. They only did that around the yard there, that I know of.
Q. What?
A. They only done it in the yard down there, they don't go out on the water.
Q. Do you work in the yard?
A. Yes.
Q. The yard is at the foot of Katherine Street, Buffalo, N. Y.?
A. Yes sir.

Kierejewski did all kinds of iron work, stacks or anything that had to be done, smoke stacks, pile drivers and so on, anything that they wanted him to do; he did boiler work, working around these boats and scows, anything he was told to do; this job was completed on the 21st of April, around 3-30 or 4 o'clock; the accident occurred around 4 o'clock; I took some of the tools away from the float; each man took his tools; Leo did the caulking and then filled it up with paint; the patch that was put on was about 2½ to 3 or 4 feet and circled around over the corner; that was all that was to be done; he was painting it with red lead; it was not much of a job; they were repairing the scow for the season's work; when I and the other men who were heping had finished we went to the shanty with our tools; the shanty is maybe a hundred or 150 feet back from the dock and there are buildings there where we put our tools; we walked back and forth from the float to this building; I made one trip; the tug was coming up when I was coming back from the tool house for more tools; I came back to the scow to see if there were any more tools around; when I came back I saw the tug coming up out in the creek, about half way out; it made no noise; I saw it go up stream beyond the scow, stop and then back up strong; there was very little noise; the tug is a low pressure tug and when it backed up strong it did not make any noise to amount to anything; I did not hear it; I could tell that it backed up strong by the churning of the water between the pile driver and scow. I could see the water there *there* was about 3 feet

distance between the side of the float and the scow; I did not hear Stoyle say anything while I was there, either before or after the accident; I do not know whether Stoyle spoke to Kierejewki when I walked with my tools to the building; it was about five minutes before the accident when I left the float and Kierejewski was the only one on the float when I left; Bush and another man had been with him just before that doing riveting; it was big enough and strong enough to hold us all; I did not know that the tug was coming to get the scow; when I first saw it it was coming by the pile driver; pile driver is six or seven feet off scow. The house is out toward the stream on that part of the pile driver and away from the dock. I did not hear anybody say anything; I did not see Murphy; I saw the whole tug, but did not see Murphy on the tug; I will say he was not on the outside of it; I don't know whether he was in the pilot house or on the other side of the pilot house; I did not hear Murphy talk to Stoyle; that may have been when I was walking away; I was not on the float all of the time that the work was being done; I was in the scow helping *do* do the riveting; Bush was doing the riveting and Kierejewski came just before we were through; he had been on the scow; I don't remember what he had been doing; he had worked on this patch, bolting it up, and then he did the caulking and painting, that is part of a boiler maker's work.

Redirect examination.

By Mr. Cole:

I could see the water from where I stood between the scow and the pile driver; I could see the churning of the water between them; the propeller of the tug caused that churning; the tug had a low pressure engine and that makes very little noise; I had no notice or warning when working there that the tug was coming up
21 to take the scow away. I don't know if anyone else on the boat had.

Recross-examination.

By Mr. Thomas:

I saw the tug coming.

Q. While you were working there, there were boats passing all day long?

A. We don't know where they are going.

JOSEPH W. BUSCH, being duly called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Thomas:

I am a boiler maker mechanic and live at 430 Curtiss Street, Buffalo, and worked for the defendant in 1919 for about three months; on the 21st of April, 1919 I had been working for them about three months. I knew Leo Kierejewski; he was a master boiler maker and had had his card as such about six months; he was about 27 years old; he was working for the defendant all the time I was there.

Q. What was the character of his work?

A. Why it was boiler work. He was patching up this iron work around there.

Q. Doing all kinds of iron work?

A. Yes.

Q. Where was the place that he worked mostly?

A. It was around on these decks on the scow or wherever they had work, wherever they sent him.

Q. Wherever they had to put up a smoke stack, boiler or any kind of iron work on the boat?

A. Yes.

I had been working on the scow about three weeks before the 21st of April; they had been working on the scow about three weeks. I had been there right along. All the gang went down together. The scow had been in use by the defendant before, it was up to the dock; there was a house on the pile driver in the center about 20 feet long and extending to within three or four feet from the outside end. It was about ten feet high; I helped build the float and scaffold, but the float itself, that had been there before; it consisted of about five planks with cross pieces underneath bolted on; it was about 20 feet long and 4½ or 5 feet wide and we had used it for three weeks; we had been putting the patch on the outside corner. There had been work at another place on the other side of the scow; used the scaffold at that work, constructed in the same way; we worked under Stoyle,
22 who hired and discharged the help in that department; the scaffold was built under Stoyle's instructions; the scaffold had been right where it was when the accident happened for four or five days and we had been working on it right along; the planks were fastened to the pile driver platform with five or six inch standard spikes and fastened to the horse in the same way; the horse was spiked to the float and the float fastened to the scow; during the three weeks that the float had been in use there had been no disturbance with them; boats were passing up and down the creek and made more or less of a wash without disturbing the float; on the 21st I with the gang had been riveting up a patch on the scow and then Kierejewski finished up caulking and chipping; he had been working on the other corner of the scow and then came over to this one

to finish up the job; to finish up this it was necessary to caulk, chip and paint it; I had known Kierejewski about three years; he was a steady worker, a competent and intelligent fellow, good at his trade; he had a good home, a wife and two children; he had no bad habits that I knew of; before Leo came there on that scaffold on the 21st, myself, Coffey, Scota and a couple of others had been working there; they were helpers; when Kierejewski came all that was left was the caulking and painting, the iron work had been finished; I did not hear Stoyle give Kierejewski any instructions at that time; Stoyle gave Kierejewski a bucket of paint and when he gave him the paint he said "Leo, while you are down there you may as well finish it up, painting it up; that was along between three and four in the afternoon; when I heard Stoyle say that to him I was on the corner of the scow where the scaffold was picking up tools, about four or five feet away from the scaffold; I did not know that anybody was coming after that scow to take it away; we were taking our tools off because we had finished the job; I saw the tug coming up the creek; I was then standing on the scow in the same place and Stoyle was right on that corner, about six feet from me. He was right around the corner where he was painting up. He was looking right down at him; when I saw the tug it was coming up about the center
23 of the creek; the scow is about 150 feet long and the tug about 75 feet long; it went up the creek to the end of the scow and then stopped and started to back up; it backed straight first and then turned in; it smashed right in there to the corner where he was working; I didn't know what the scow was coming for because there was a lot more of them standing there; when I saw the tug go by I did not hear anybody on the tug say anything to Stoyle; I did not see anybody on the tug except one or two tug hands; I know Murphy, the superintendent; I didn't see him; I didn't see La Croix, the captain; I didn't hear anything said by anybody on the tug to Stoyle as the tug went up the creek nor at any time; I was close enough to hear; I should think about 3 or 4 feet; I didn't hear anything said by anybody on the tug when it commenced to back up; it backed up strong to within three or four feet of the scaffold and when it got there the scaffold went down. It pulled up and the water drew the scaffold right down.

Q. When the boat is backed up and the time comes to stop they sometimes give a kick ahead not only to stop the boat but to move or propel the boat ahead. Did you see anything or hear anything of that kind happen?

A. No. They had the propeller running right along.

I noticed a disturbance in the water, it churned up and down, that pulled the float down enough to shake off the scaffold and pulled the spikes out; I saw the planks collapse when it went down; the whole business went down; Leo went down into the water; I did not hear Stoyle tell Kierejewski to get off the scaffold before the accident; when he saw the danger he hollered "Leo, look out." Kierejewski made an attempt to get off but he did not have time; the tug had

already backed in when Stoyle said that; he said Leo look out and Leo made an attempt to get off but it was too late; he was going to jump and get hold of the scow there but he could not get hold; Kierejewski had a bucket of paint and a brush on the scaffold; that was all he had left there; he dropped that and was trying to
24 get hold of the scow; the planks went down just as he dropped the bucket and brush and he went down between the pile driver and the scow; Kierejewski did not come up again; it was about fort*h* minutes before they recovered his body; the tug stayed there for a while; they started to fish for him with a pipe pole and then they came away; they did not find him; Leo was dead when he was recovered.

Cross-examination.

By Mr. Thomas:

I am working for the Great Lakes Dredging Company as a boiler maker, same as before; we looked at the spikes in the scaffold every morning when we went on the job to see that everything was all right because of the movements in the creek the day before and in the night; I saw the tug as it came into view past the pile driver; it was about the center of the creek about fifty feet away from the scow; it went up to the end of the scow that was headed up stream so that the stern of the tug had gone beyond the end of the scow; then it backed in about parallel with the dock line, which would also be the line of the scow, until it got nearly to the down stream end of the scow and then turned in on an angle.

Q. Could you hear the tug back up?
A. Not much.
Q. You could hear it, though?
A. Hear some of it.

When I first noticed the commotion in the water the tug was about fifty feet from the scaffold and just turning in; at that time it did not raise much commotion, but it increased; it came within three or four feet of the float but didn't hit the float that I noticed; the tug stopped when the scaffold went down, but the propeller was running. Kierejewski was standing on the planks on the scaffold, not down on the float; he held the paint pail and brush in
25 his hand; all that he had to do to get off the pile driver was to walk along the planks; he did not have to pick up any tools.

Q. How far was he from the pile driver when you saw him go down?
A. How far was he from the pile driver?
Q. Yes.
A. He worked on the scow. The pile driver stood all of 4 or 5 feet——
Q. No, how far was Leo from the pile driver when you saw him fall down?

A. He fell in between the pile driver and the scow.
Q. Can you tell how far he was from the pile driver?
A. About 3 feet, something like that.
Q. How far had he walked along the planks before he fell down?
A. He didn't walk.
Q. Didn't he move along the planks at all?
A. The only time was when they hollered "Look out!" he made an attempt to get off. He dropped the bucket of paint and made an attempt to get hold of the scow but the scaffold went down under him.
Q. Leo did not move along the planks at all?
A. No.
Q. Aren't you mistaken then that when he fell he was within three feet of the pile driver?
A. He fell backwards.
Q. How far is it between the pile driver and the scow?
A. Five or six feet.

He was painting on the inside corner. The patch was there. Right on the corner. I did not hear Stoyle tell him anything until just immediately before the accident. I saw Stoyle hand him the paint. Leo went on and started painting. Was left there alone. All of the others had finished up and were gone. Everybody was off the float. When Stoyle gave Kierejewski the paint I was on the scow picking up the tools; I was on the scow all the time; I didn't stay right in one place; Leo had the paint pail in his hand. Had been painting. Could not say how long—only a couple of minutes. I didn't hear Murphy call to Stoyle nor see Murphy at all; I didn't hear anybody say anything until just before the accident happened.

Whereupon the following question was put to the witness.

26 Q. If Murphy did talk to Stoyle, Stoyle was near him?
A. Yes.
Q. If Murphy did talk to him and you did not hear him that might be because you were busy with all of those tools around there?

Plaintiff's counsel then objected to the question upon the ground that it was a conclusion and argumentative, which objection the Court sustained and the defendant thereupon prayed for an exception to the ruling of the court, which the court allowed (the witness continuing). At that time I was picking up bars and brushes and such things; they are iron and make a noise when handled and my mind was on my work.

Redirect examination.

By Mr. Cole:

When the tug started to back up I saw it coming up.

Recross-examination.

By Mr. Thomas:

This tug drew my attention because I noticed it coming up and they all draw my attention; I stopped my work and looked over; there was nothing particular about it that attracted my attention; when it came up it didn't churn the water up much but
27 started to churn it up when 50 feet away and it got worse and worse until it went down again. It churned the water all around the float. Kierejewski had five feet to go to get to the pile driver. He was five or six feet from the pile driver when he fell. When he dropped into the water he fell over. When I said three feet from the pile driver I meant his head.

Eeward Zagoda, being duly called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Cole:

I am a boiler maker's helper living at 186 Koons Avenue, and work for the defendant on the scow in question in 1919; I had been working there four months and on the scow three weeks; I knew Leo Kierejewski; he had been working there while I was working; on the 21st of April I worked on that patch on the scow as one of Kierejewski's helpers; I had been working on the scaffold and helped put it up; boats were going up and down the creek all the time, some of them going pretty strong and making something of a wash; they didn't disturb the scaffold much, not enough so that we had to get off it; I didn't know the tug was coming after the scow that day; I went down to the house to take some of the things down and then came back on to the pile driver; I didn't see Stoyle on the scow; when I left Kierejewski was there alone; I went on to the pile driver and I saw the tug going up the creek by the scow; I didn't pay any attention to what it was doing; I coiled up the hose and put it on my shoulder and walked down the board from the pile driver to the dock; when I was half way I heard a shout; I was just getting off the pile driver on to the board; I was back towards the float; the tug was there about five feet from the float working her propeller; it shook the scow and the pile driver terribly; I felt the pile driver shake and saw the scow shake; the float and the scaffold went down; I saw Kierejewski's cap floating in the water between the pile driver and the scow; the force of the water shoved the pile driver away from the float and caused the boards and nails
28 to let loose from the pile driver; I helped fasten them to the pile driver; they were fastened with four nails, big six inch spikes in each end of the planks; it was about forty minutes later that they got Leo's body; there were police around there and they put a stop to trying to revive him; they said there was no use in trying to revive a man after he was in the water that time.

Cross-examination.

By Mr. Thomas:

It was about five feet from the end of the scow to the pile driver; Kierejewski was standing at the corner of the scow on the planks; he was painting; when I came back to the scaffold the tug was five feet away from the float; that was the first time I saw the water moving; the scaffold was partly submerged in the water.

FRANK COFFEY, being duly called and sworn on behalf of the plaintiff, testified as follows:

I am a boiler maker's helper; I live at 196 Mackinaw Street and am in the employ of the Great Lakes Dredge and Dock Company; I was in their employ in April, 1919, and worked on the scow in question on the day the accident happened, at the same corner where the accident happened; I was working on the inside of the scow; Thomas Busch and Zagoda helped me. Kierejewski was working on the other end of the scow. He did not help put it up. I helped move the float and carry the planks and hose from the other end of the scow; Stoyle is the foreman of the boiler makers' gang; he hired me and hired the men that work in the boiler makers' gang; when the accident happened I was on my way back to the shanty with some tools; when I got back the accident had happened; I did not see the tug come up before the accident happened; I went and got a grappling hook; before I got it I saw that the scaffold was knocked down on the float and the tug was in midstream and nobody was standing on the plank; the planks were torn loose from the pile driver; Kierejewski had been working for the Great Lakes
29 about six or eight months; he was a good steady workman, on the job every day, with no bad habits. After the accident one end of the planks was in the water and the rest on the float. The horse was knocked down.

SOPHIA KIEREJEWSKI, the plaintiff, being duly called and sworn in her own behalf, testified as follows:

I am the plaintiff and the wife of Leo Kierejewski; I had been married to him seven years; we had two children, one boy and one girl; the boy is six, the girl three; when the accident happened the girl was ten months old and the boy nearly four years; I live at 97 Guilford Street; have lived there about three years; it is a rented house; my husband and I kept house there; he supported the children, gave me his pay every two weeks; he was getting eighty cents an hour with lots of overtime, sometimes worked twelve, sixteen or eighteen hours a day; he got double pay for overtime; In March he brought me $167.50, in February $167.20, in January $165; that is about the way his pay ran; he was a good husband and father; was educated in a Polish school; we had a nice home; I saved the money that he brought home, paid for furniture with it and paid for the

funeral; he used to read the daily and Sunday papers, weekly magazines and monthly magazines; I don't know what magazines; he took the Evening News and Morning Courier; spent his evenings at home, did not drink nor have bad hadits; worked every day; was a good sized healthy man; I saw his body the same day as the accident; he left me some money but I spent it for his funeral, about $600 dollars; the funeral cost me $302, the monument $95 and I bought clothes to bury him and a lot of different little things.

At this point it was conceded that a claim was put in by the plaintiff with the Industrial Commission of the State of New York under the Workmen's Compensation Law for compensation for the widow and children; the claim was allowed and on the 9th day of May, 1919, an award was made of $11.54 per week, and that award remained in force until February 25, 1921, and upon it was paid by the carrier of the insurance for the defendant the sum of $1,045.60, then on the 25th day of February, 1921, the award was revoked and the claim dismissed by the Industrial Commission on the application of the carrier of the insurance for the defendant and the payments discontinued and no other payments have been made. Of the $1,045, $100 was the statutory allowance for funeral expenses and the remainder, or $945.60, was on the weekly allowance.

At this point the plaintiff introduced in evidence letters of Administration, by which it appears that prior to the commencement of this action, and on March 7, 1921, Sophia Kierejewski was duly appointed administratrix of the personal estate of Leo Kierejewski, deceased.

Matthew W. Bennett, being called and sworn as a witness on behalf of the plaintiff, testified, in substance, as follows:

I am an attorney and counselor at law and was employed by Mrs. Kierejewski after her award had been rescinded by the Industrial Commission; I then started an action in the Supreme Court, prepared a summons and took it to the Sheriff's office in Erie County for service upon the defendant; I took it to the Sheriff April 16, 1921, and left it with the sheriff and asked him to serve it on the defendant; it was subsequently served on the defendant on the 25th day of May, 1921; that summons is the summons in this action. At this point plaintiff introduced said summons which was received in evidence as exhibit 2, and dated April 11th, 1921, in the Supreme Court of the State of New York, Erie County, also on the back of this summons was received in evidence the certificate of the Sheriff of Erie County as follows: "Buffalo, N. Y., Received 1921 April 16, A. M. 11.46, Sheriff's Office, Erie County. The title of the action being, Sophia Kierejewski, As Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff, against Great Lakes Dredge & Dock Company, Defendant."

This summons is in the usual form of a New York State summons in a Supreme Court action, requiring defendant to answer within twenty days after the service of the summons and in case of

his failure to do so judgment to be taken by defaul- in favor of plaintiff for the relief demanded in the complaint besides costs.

Plaintiff also offered in evidence, which was received and marked exhibit 3, a certificate of the Sheriff of Erie County showing that said summons was duly served on defendant, Great Lakes Dredge & Dock Company, on May 25, 1921, at the City of Buffalo, County of Erie and State of New York.

31 JOHN A. GLADKOWSKI, being duly called and sworn on behalf of the plaintiff, testified as follows:

I have a news stand at Fillmore and Broadway; I knew Leo Kierejewski; he used to be a customer of mine; he bought the Morning Courier and I delivered the News at his home; he got the Saturday Post and the World's Work every month.

At this point the plaintiff introduced in evidence the American Table of Mortality, showing that at the age of twenty-seven
32 years the deceased had an expectancy of life of 37.43 years.

It was conceded that this case was commenced in the Supreme Court of the State of New York and was removed to this Court on the application of the defendant, on the ground of diversity of citizenship, the defendant being a New Jersey corporation.

The plaintiff thereupon rested.

At the close of the foregoing evidence the defendant moved for a dismissal of the second count set forth in the complaint, to which motion the plaintiff consented and the Court thereupon ordered the second count of the complaint dismissed. The defendant then moved that the Court grant a non-suit upon each of the following grounds:

1. That the plaintiff had failed to establish the cause of action alleged in the complaint.

2. That the plaintiff had failed to prove any actionable negligence against the defendant.

3. That it affirmatively appears that the deceased was guilty of contributory negligence.

4. That the Court has no jurisdiction of the case.

5. That the action was not commenced within the statutory period.

Whereupon the Court took the said motion under advisement, denied the motion made upon the ground that the action was not commenced within the statutory period and reserved decision upon the motion upon the other grounds stated, to which ruling of the Court the defendant duly excepted.

The defendant to sustain the issue upon its part then offered the following evidence of testimony of the following witnesses:

It was conceded that the defendant took all necessary steps to insure and pay compensation to its employees, who are under the Workmen's Compensation Act of the State of New York.

BERT J. WAHL, being duly called and sworn as a witness on behalf of defendant, testified as follows:

Direct examination.

By Mr. Thomas:

I am a bookkeeper and clerk in the office of the sheriff of Erie County, N. Y., and have been for the past five years; part of my duty is to receive processes for service; I received the process to serve in the case of Sophia Kierejewski, Administratrix, against the Great Lakes Dredge and Dock Company, on April 16, 1921, from Matthew W. Bennett, attorney, plaintiff's then attorney of record. Mr. Bennett said he wanted it served on the Great Lakes Dredge and Dock Company. I asked on whom to serve it, the defendant being a foreign corporation and it had to be served on a president, vice-president, or secretary in the State of New York. That he would find out and advise me later. Later he came in and said that Samuel Dark was the vice-president residing in the City of Buffalo, State of New York, and I could serve on him. The papers were served on May 25, 1921, on Samuel Dark, vice-president of the Great Lakes Dredge and Dock Company.

JEREMIAH J. MURPHY, being duly called and sworn as a witness on behalf of defendant, testified as follows:

Direct examination.

By Mr. Thomas:

I am superintendent of the Great Lakes Dredge & Dock Company and have been for ten years in Buffalo; the defendant's yard is at the foot of Katherine Street; it has some scows, the tug Edwards a pile driver and some equipment for dredging and other work; on April 21, 1919, the Company was dredging in Buffalo Creek and for a few days before that; the season has just started; it was about 1,000 feet away from Katherine Street; the dredge was dredging out the creek and filling a scow with material taken from the bed of the creek; at the opening of the season and prior thereto we got our equipment in shape for the year's work, which consisted of making all necessary repairs; we had a repair gang at the foot of Katherine Street; I had charge of that particular gang, with foremen under me. Stovle was one of the foremen in charge of the iron workers and boiler makers; there are about fifteen men in that gang. I think five boilermakers and the rest helpers or iron workers; they repair boilers in the plant and yard, fix up the steel

equipment on the dredges and scows and any kind of iron work there is to be done. We have steel knuckles for our dredges and do any kind of iron work on the boat-houses, etc.; they do anything with respect to the equipment at the yards that needs to be done, repair anything in the yard that needs to be repaired; anything that is prepared at the yard to go on the scow, pile driver or tug; an iron worker is a helper to the boilermaker; they also do iron work on small jobs; Stoyle hired Kierejewski; I remember the accident; we were going to take the scow down to the dredge and load it by means of the tug Edwards; Captain La Croix is the captain of the tug Edwards; I had spoken to Stoyle earlier in the day about taking the scow down there; he knew that I wanted it down there; I wanted it there to load from the dredge so that we could keep on with the dredging work; because the other scow was loaded. We needed it to keep dredging; the accident happened around noon, or before noon. I came up with the tug Edwards in charge of Captain La Croix just before the accident; as we got opposite the pile driver the tug was going about four or five miles an hour; at that time the engine was stopped and we were floating along; it has a low pressure engine; we were about ten feet out in the stream from the pile driver; I was standing on the tug; just as we came by the pile driver I saw Stoyle standing on the corner of the scow and a man working on the corner; it was Kierejewski; I sung out to Bob Stoyle to get off that scow and get the men off; that we were going to take her away; I didn't hear what Stoyle said but I saw him saying something to the men on the scow; then the tug went on ahead towards the scow; she went up stream half way by the scow and then came to a stop and the tug then dropped back in pretty near the float and began to back up towards the float and then stopped by using the power in doing so; that made a little noise; I could hear it and it could be heard as far as the length of the scow; when the tug backed it backed very slowly, probably two miles an hour; it continued backing up twenty feet, then stopped and drifted back near the float; then I hollered to the captain to get away, to turn ahead so that he would not hit the float; he got near the float. We didn't want to hit the float; he gave the engineer one bell, and the engineer went ahead with the engine. He reversed the propeller wheel, gave her a kick ahead for about ten seconds, just enough to stop the tug; that caused a slight commotion in the water; when I sung out to Stoyle I was standing on the tug about on the quarter forward; as the tug came back I walked back right on her fan tail; Kierejewski was down on the float; he got up on the plank and started to go ashore, got within three or four feet of the pile driver when the plank fell down and he fell into the river.

Cross-examination.

By Mr. Cole:

I had been superintendent for the defendant in Buffalo for ten years; I hired and discharged men; Stoyle hired and discharged

men in his department; I have control of men in my department an
he has control of the iron workers and the boiler makers; I don't re
me-ber just which scow this was; it was one that we had been usin
the season before; it had not been used that year; it was bein
prepared for that season. I knew that Stoyle and his men were a
work on the scow and had been probably ten days or two weeks; no
over that; Stoyle was around the yards when I told him I was comin
after the scow that day; I told him about noon that I wanted the scow
he was not in the scow when I told him; when we went by th
scow we were probably thirty feet from the end of it, ten feet fro
the pile driver. The tug is about 70 or 75 feet long, the scow 14
feet; we didn't go by the scow at all, but to about midships of her
when we stopped the stern was about 70 feet from the float; I saw
Kierejewski working on the corner; he was the only man on th
float; I saw him when we went by; Stoyle was on the scow when
talked to him; I spoke to Stoyle the minute we came clear of th
pile driver, as soon as I could see him; I didn't ask him i
36 the scow was finished; I said "get off that scow, we are goin
to take it away." I knew it was done.

Q. Were you going to take it away before the float was remove
or the scaffold taken down?

A. If we had to.

Q. Were you going to take it away before the float was removed
the scaffold taken down?

A. Yes before the scaffold was taken down. We were going t
fasten the tug to the scow alongside of it, just ahead of the float;
don't know where the captain was going to fasten; he might hav
thrown a tow-line on it; I don't remember testifying before that w
were going to fasten to the scow right there at the corner where th
float was. I did not give the order to back up; the captain backed u
without any order from me; I wasn't running the boat; I heard hi
testify before in this case. I don't think I heard him testify that
gave him the order to back up, that he could not see, that he w
in the pilot house. I didn't give him orders to back up that I re
member; I stood on the deck of the tug; when we came along the
I was about a quarter way from the bow; then I walked aft an
stood in plain sight of the scaffold and float; I saw he man workin
there; saw the tug back up towards them; the tug did not bac
up strong.

Q. Do you remember testifying before, we always back up stron
until she stops going and then back up slow?

A. Yes I will admit that, when we are going ahead you give th
engineer two bells to back.

Q. Then you back strong to start?

A. The minute the tug is checked they slow right down
37 Q. Then you back good and strong?

A. Yes, at first.

Q. Why did you say to counsel before that you didn't back u
strong?

A. That was when we were backing up.

Q. He asked you if you backed up strong, and you said that you didn't.

A. When we backed down to the end of the scow we backed slowly, but when the tug is kicked ahead——

Q. What did you mean when you said "We always back up strong until she stops going?"

A. Until the boat stops going ahead, you always back up strong until you stop your headway.

Q. When the boat is going ahead it isn't backing, is it?

A. She could be going ahead and backing too.

Q. You reverse the wheel, or the Captain gives orders to reverse the wheel?

A. Yes.

Q. Then you back up strong?

A. Yes.

Q. How far?

A. Until your headway is stopped and then you slow her right down.

We got to about five feet of the float before we gave the kick ahead; I gave the order to kick ahead, the order — go ahead; I would not call it a good strong kick ahead; it did not make much of a disturbance in the water there; it could not rock the scow, it is impossible; the commotion in the water made the scaffold fall
38 and the kick ahead by the tug made the commotion in the water; I suppose it was the movement of the tug and the disturbance in the water by the tug that made the scaffold fall; when we gave the kick ahead Kierejewski was going ashore on the plank; the tug was then about five feet from the float; the current from the wheel of the tug would pull the float away from the scow and that is what made the scaffold fall; it was the kick ahead that did that; that was when I saw Kierejewski going ashore on the plank; up to that time he was down on the float painting; we were coming up sideways towards him; we were not coming up to attach to the scow before the scaffold and float were taken away; we would detach the float before we took the scow away; we carry men on the tug to do the attaching; to attach that scow to the tug they would have to go on the scow; they would detach the float from the scow, before we took it away.

Q. Why did you go up within five feet of the float if you were going to have the float and scaffold taken away before you attached?

A. They could get the scow——

Q. Murphy, will you answer the question?

The Court: What was the question?

Q. Why did you run up to within five feet of the scow if you were going to have the float and scaffold taken away before you attached?

A. You don't know. I am trying to tell you. In the first place we carry men on the tug to do the attaching. To attach that scow to the tug they have to go on the scow, the scowmen, they are called. These scowmen would go on the scow and detach the scow from the tug and the float from the scow before we took it away.

Q. You didn't have to run up to within four feet of the float?
A. We didn't run up to within four feet.
Q. Didn't you just say so a few minutes ago?
A. We backed down to within four feet of the float.
Q. You didn't have to back down to within four feet of the float to get your men on the scow?
A. No.
Q. You could have attached a line to the scow seventy feet away and put your men on the scow?
A. Yes.
Q. Why didn't you do that?
A. I don't know.

Kierejewski didn't have time to get off the float from the time of the commotion in the water; he had lots of time to get off from
39 the time I told him to; I told Stoyle and Kierejewski heard me tell him; he was thirty feet from me painting and Stoyle stood on the deck. I hollered at him; I think he had reason to believe that we would fasten to the scow before the scaffold was removed. We intended to fasten on the scow when the float and scaffold were there; after we had backed up within four feet of the float and the disturbance in the water began to disturb the float and Kierejewski tried to get off, he did not have time to get off before the scaffold fell; he had lots of time to get off after he was first told;

A. We didn't intend to remove the scaffold. We intended to remove the float from the scow, and the scaffold would stay there.
Q. Didn't you say a little while ago that you had intended to remove the float and the scaffold before you attached to the scow?
A. I said we would detach the float from the scow.
Q. Didn't you say that you intended to do that before you attached the tug to the scow?
A. Yes. When these men would go on the scow they would let go of the line and let the float go.
Q. Can you give any reason, if you intended to do that, why you permitted the *the* tug to back up within four feet of the scow and then give a strong kick ahead?
A. We didn't give any strong kick ahead.
Q. Any kind of kick ahead. Can you give any reason for doing that?
A. We did it.
Q. Did you intend to go right up and fasten on that scow while the float and scaffold were there?
A. We intended to go right up——
Q. Can you answer the question, Murphy?

The Court: Just answer the question.

A. Why, yes, we intended to fasten on the scow when the float and scaffold was there.
Q. Then you didn't intend to have it removed before you fastened on the scow, did you?
A. No. You don't understand.

Q. After you had gotten within four feet, backed up within four feet of the float and that disturbance in the water began to disturb the float and Mr. Kierejewski tried to get off, he didn't have time to get off then before the scaffold fell, did he?

A. No, not then. He had lots of time to get off after he was first told.

40 Q. Did you testify to this before:

"Q. You knew this man was on the float or scaffold somewhere?
A. Yes.
Q. He didnt have time to get off, did he?
A. No."

A. Yes, I remember that.

As Superintendent of the defendant I have charge of the whole work; Stoyle was under me; the tug and the scow and the pile driver all belong to the defendant and were operated and used by it; we had six men on the tug, the master made seven; we got right
41 alongside of the scow when we ran the tug up there. They could have jumped off on to the scow when we were 50, 60 or 70 feet from the float; I did not order them to do that; I didn't issue any order to this man; we could have stopped the tug and kept it there until those men got off the float; if we had stopped the tug and sent a man to tell Kierejewski to get off it would not have delayed us more than two or three minutes at the most.

Redirect examination.

By Mr. Thomas:

I wasn't undertaking to direct the operation of the tug; it was under the charge of the captain; it wasn't my place to say how the tug should be handled and I didn't attempt to say how it should be handled; what I meant when I said that the float and planks were not to be removed was that the float and scaffold were not to be removed from their position, but that a line by which they were attached to the scow was to be cast off so that the scow could be taken away; they were to be left right where they were and the lines simply cast off so that the scow could be towed out and taken to her position; after Captain La Croix got the tug to within thirty feet of the scow the tug stopped and started backing slowly down the side of the scow; then her engines were stopped again and she continued to drift slowly back. The purpose of the kick ahead was because if the tug was not stopped it would have drifted into the float or the pile driver and it was to stop her going astern and prevent her from drifting back; the only other way that could have been done was to bump into the pile driver; my duties as superintendent were to look after all of the actual operations; there was a manager over me and a foreman under me; I didn't mean that I had actual control of the company, but just the outside operations.

Cross-examination.

By Mr. Cole:

I had control of the outside operations; La Croix and
42 Stoyle were under me as superintendent and I had power to give any order that I wanted to as superintendent; the tug could have stopped right alongside of the scow and still have been 50 or 60 feet from the float; I don't know how that scaffold was put up, I didn't examine it; I saw the planks on the pile driver; we were going to cast off the line from the float to the scow and let the float stay there.

Q. Was it necessary for you to back up so far in order to attach to the scow to pull it away?

A. It was not necessary to come within 400 feet for that matter. We could have attached to the scow without coming so close to the float; I don't know the reason for backing along side there; it is customary to go along side of scows when you want to get hold of them; that is the captain's position; I didn't tell him where to go, only to get the scow. I am a tug man but wasn't acting as a tug man at that time; I was acting as superintendent.

ROBERT STOYLE, being duly called and sworn on behalf of the defendant, testified as follows:

Cross-examination.

By Mr. Thomas:

I am fifty-nine years old and work for the defendant. I have worked for the defendant probably six or seven years; I was foreman under Murphy on April 21st, 1919; I knew Kierejewski; he had worked for us probably a year or a little better; on the day of the accident Murphy spoke to me about taking the scow down to the dredge that day, in the morning; I knew about it; I didn't say anything to Kierejewski about it at the time; Murphy spoke to me; did not talk with Kierejewski later; I was talking to Kierejewski when the accident happened; I saw the tug coming up and saw Murphy on it when it passed the pile driver; he hollered, get the men off the float; Kierejewski was on the float; I was on the corner of the scow looking down, he was under me; Murphy hollered, get the men off the float; one has to talk pretty loud to me in order for me to
43 hear because I am rather hard of hearing; the tug was just moving along slowly; it went half way by the scow, then it stopped and backed up by reversing the engine; I could hear that; then he drifted back; at that time Leo was getting off from the float; I told him to jump or he would get wet when I saw the tug coming; when I said to jump I meant for him to get from the float on to the plank and over on to the pile driver; the next thing that happened he was going across the plank and he got within a step of the end when the plank fell off and he went down; in the meantime the tug

was backing up; it was coming back; there was enough of a commotion in the water to cover the bottom of the float; it rocked the float.

Q. Had you ever before seen planks pulled away by any commotion in the water?

A. I never worked upon them before where they were doing a job like that; they generally have two horses with a raft and the scaffold is placed on the horses; this time we had a better chance to nail them up.

Q. You mean to the pile driver?

A. Yes. That looked safer and better to me because it was a place where you could get off and on better; I didn't look at the fastenings at the pile driver end after the accident. It was our job to look after things and see that everything was right when we were working on the job; by our I mean everyone in the gang; after Murphy called out to me to get the men off the float I told Leo to jump, he would get wet as we were coming after the scow; that was when the tug was at the corner of the pile driver coming up towards the scow; it had not yet started to back.

Cross-examination.

By Mr. Cole:

44 It wasn't backing, it was going up ahead; I stood on the corner of the scow watching Leo work down on the float; he was finishing up doing the painting; the tug came up past the scow all of thirty feet away from the float; it headed in and must have been at the center or past the center of the scow before they got close up to the scow; I think the scow is about 110 or 115 feet, maybe it is 125 feet long; I don't know whether I said 145 before; when the tug was up close to the scow the stern of it was towards the float; I think maybe the stern would be around fifty feet from the float; it was when the tug was coming in right at the end of the pile driver when I had the talk with Murphy; When I told Leo to get off or he would get wet he started picking up his hammer and gathering his tools up; he had a paint pail on the planks and he started to get off.

Q. He didn't have time to get off before the accident happened?

A. No sir.

Q. What?

A. He didn't get off in time.

Q. He didn't have time to get off.

A. I would not say whether he did or not.

Q. You were sworn before?

A. Yes.

Q. Do you remember this question being asked you before, "He didn't have time to get off" and answering it "no sir."

A. I don't remember.

Q. Did you say that?

A. I suppose I did. He didn't have time or he would have been off. I don't know where the tug was going to attach to the scow;

I didn't know that the tug was going to back up so close to the float; I knew nothing about the tug, I only saw it coming.

Q. When you saw the tug backing up and saw it getting so close to the float then you said to Leo "get off or you will get wet," is that right?

A. It was too late then, it was up there.

Q. You didn't say anything to him at all when you saw the tug backing up there?

A. All I told him was to jump so that he would not get wet; I didn't know where the tug was going to fasten to the scow; I saw the tug back up after it had stopped alongside of the scow.

45 Q. You saw it backing right towards that float, didn't you?

A. Yes.

Q. Leo was still painting, wasn't he?

A. No, he was getting off.

Q. Did you say anything further to Leo then?

A. No, sir. Fifty feet from the float; Leo was then getting off; I said nothing further to him then; I didn't yell to Murphy or La Croix to stop the tug; I didn't say a word to them; I didn't see Le Croix; I cannot say how close the tug got to the float when it gave the kick ahead.

By the Court:

When I told the deceased to get off the tug must have been 20 or 30 feet outside; it was coming in them; it had not stopped.

By Mr. Cole:

When I told him that he picked up his tools, left his pail of paint on the scaffold and started walking off the plank towards the pile driver; that was the usual way to get off; before he could get to the pile driver down came the scaffold; the rocking of the float by the tug caused the scaffold to come down.

By the Court:

The tug was 30 feet outside and coming ahead when I told him to get off the float so as not to get wet; it was coming in to come up to the scow; two or three minutes elapsed between then and the collapse of the scaffold.

By Mr. Cole:

I knew that the tug could not get in close to the scaffold because they were too far ahead unless they backed up; neither I nor Kierejewski knew they were going to back up.

Redirect examination.

By Mr. Thomas:

When the tug was coming up stream and got just beyond the pile driver Murphy talked to me and I spoke to Leo about getting off; then it continued on and stopped and then started to back and then floated back and at that time the accident happened and that
46 took two or three minutes from the time Murphy talked to me and I talked to Leo before the accident happened; I didn't call to La Croix or Murphy to stop the tug, because I had nothing to do with them; I hired Kierejewski as a boiler maker; he had not worked for me before but he had worked as an apprentice in the shop where I worked; when he came to work with me he hired as a boiler maker; a boiler maker does anything in the line of boiler work, shop work or anything that they want and that they can do; it includes repairing boilers, patching them, taking out flues, putting them in, fixing smokestacks, patching steam pipes, etc. I could enumerate a hundred different things that they do, they have got to do anything in the yard. Part of our work is done on shore and part aboard boats; we have boilers as part of our line equipment, a machine shop, blacksmith shop, carpenter shop and a general repair shop; the boiler makers also work in those shops on metal, he does metal work and iron work, anything in the iron line.

Recross-examination.

By Mr. Cole:

At this particular time I and Kierejewski were engaged in repairing this scow and had been doing that work maybe twelve or fourteen days; the scow had been used in navigation up and down the Buffalo river or creek and also in the Lake. Buffalo River is a navigable stream; steam boats ply up and down it; the scow was a vessel owned by the defendant and used in carrying on its work in the harbor and on the River; the work proper of the defendant was that of dredging and building docks around navigable waters; Kierejewski was a master boilermaker, a good steady workman, obeyed orders, was of good habits so far as I knew; when he was there on the scaffold working he had to ply a paint brush and he also had a chisel and hammer; the hammer he used for caulking; I had told him to go there and finish that job; there was only five minutes painting that he had to do;

47 Q. Murphy had not told you that he was coming up to move that boat, had he?

A. He said he wanted that boat as soon as he could get it.

Q. He had not told you that day?

A. He told me in the morning that he wanted the boat that day in the afternoon, that he was going to take it away whether I was

through with it or not. I didn't say anything about that to Kie
jewski or anybody on the boat.

Redirect examination.

By Mr. Thomas:

The scow was not yet in commission for that season's work; it h
not been used that season.

JOSEFUS A. LACROIX, being duly called and sworn as a witness
behalf of the defendant, testified as follows:

Direct examination.

By Mr. Thomas:

I am a tug captain, 45 years old and work for the defendant
have been in Buffalo for the past ten years as captain; I have
my papers and had them at the time of the accident; I remem
the accident; I had received instructions to take the scow away;
Murphy came on board the tug at the dredge and he said, we w
go up and get that scow, referring to the scow at the foot of Ka
arine Street; we are going to take it back to the dredge; then
started up towards the scow; there was on board Mr. Murphy,
scowmen and the crew; the scowmen are the men who handle
lines on the scows; as we came in to get the boat around oppos
the pile driver we were going about two miles an hour and
making much noise except the exhaust of the pump and the
charge of the air pump; when we got just abreast of the corner
that scow where the men were working, Mr. Murphy hollered
to Mr. Stoyle to get the men off from there, that we were going
take the scow away; I didn't notice whether Stoyle talked to
men there because I was watching my business; I drifted in th
pretty near to the upper end of the scow and stopped by revers
the engine; that made some noise and can easily be heard 100
200 feet away; then Mr. Murphy sung out to me to take the s
away and the tug backed down by reversing the engine, that
after we had stopped.

Q. Did the engine make a noise then?

A. Some.

Q. Could that be heard for a distance of a couple of hund
feet?

A. No I don't suppose it would.

Q. It was not quite as loud?

A. No, sir.

48 we backed slowly, then drifted, that is we stopped the ba
ward motion of the engine and drifted back; I looked ba
to see if anyone was on the float; I did not see anyone on the fl
when we went back; I saw a few men on the pile driver towa
the scow end; then we drifted down there until I got near that

driver and then I gave it a kick ahead to avoid hitting the pile driver and to bring the tug to a stop; it was not much of a kick ahead, a dozen revolutions or so, that is all; that stopped our going back stern on, brought the tug to a standstill. The next thing that came to my attention was they were hollering "there is a man overboard"; that is the first that I knew that there was a man in a place of danger; later this man was brought up from the bottom of the river; when I heard that call I looked but didn't see the man then; the effect of the water on the float was not much; there is always a certain amount of slack in a line that is tied to a dock. Of course it moves the scows a little. By the scow I am referring to the pile driver; there was some movement of the scow; I didn't see the float submerged at all, a little splash of water went over it, that was all. I saw the planks after they were down, but didn't see them go down; this kick ahead is a customary movement to stop the motion and was no harder or different than usual; it required about a dozen revolutions in the kick ahead to stop the movement of the tug and we could not have stopped any other way.

Cross-examination.

By Mr. Cole:

Q. Of course if you had not been so close to the float when you tried to stop your motion of the wheel it would not have affected the water so that it would have affected the float or either of the scows, would it?

A. Why no, if I had not been there it would not.

49 I was working subject to Murphy's orders; when we came there and got alongside of the scow we went up close to the scow, the stern of the tug was then 50 or 60 feet away from the float. Nobody gave me orders to back up; I backed up without orders. Murphy said at that time to take the scow away, that meant to tie up alongside of the scow; I was going to attach to the scow at the lower end where the float was and before the float and scaffold were taken away. We could attach to the corner of the scow with a line when the float was there; we could have attached to the scow and the tug further up towards the other end but not so as to handle it in the river. I didn't see anybody on the scaffold when I started to back up; I was in the pilot house and could see the scaffold; I looked, nobody was on it when I started; we backed up 50 or 60 feet and got 4 or 5 feet from the scaffold and then gave a kick ahead; no one told me that there was some one on the scaffold and I had no knowledge of it; I didn't see anybody trying to get off; I found out afterwards that there was some one on there and that he was drowned.

Redirect examination.

By Mr. Thomas:

That somebody was right in line with the people I thought was on the pile driver; the pile driver is so much lower than the scow that when they were standing down there they could only be partly seen.

Recross-examination.

By Mr. Cole:

When we went up Stoyle was on the dump scow; I don't remember testifying before that Stoyle was on the pile driver; I am not sure whether he was on the mud scow or on the pile driver scow.

At this point the plaintiff conceded that the defendant had designated a person within the State of New York on whom service might be made and that the designation was in force during the
50 times in question, whereupon the evidence was closed. This was all of the evidence in the case and at its conclusion the defendant renewed its motion for a non-suit upon the grounds mentioned at the close of plaintiff's case and moved for a direction of a verdict against the plaintiff and in favor of the defendant upon each of the grounds stated in the motion for a non-suit and upon the further ground that it now affirmatively appears that this is a case where the exclusive remedy is under the Workmen's Compensation Act of the State of New York. The Court then denied the motion upon each of the grounds stated and the defendant then again moved for a dismissal of the complaint upon the ground that the case was not within the jurisdiction of the Court, which motion was denied. The defendant then excepted to each of the foregoing rulings of the Court and said exceptions were duly allowed. Counsel for the plaintiff and defendant respectively then summed up before the jury and the Court then charged the jury as follows:

Charge to the Jury.

GENTLEMEN OF THE JURY:

This action was originally brought in the Supreme Court of the State of New York, and later, on motion of the defendant, it was removed to this court because of the diversity of citizenship of the parties, the plaintiff being a citizen of this state and the defendant corporation a citizen of the state of New Jersey.

The action is brought by Sophia Kierejewski, as administratrix of the estate of her husband, to recover damages alleged to have been sustained on account of the carelessness and negligence of the defendant corporation, in consequence of which the intestate was

drowned on the 21st day of April, 1919 in Buffalo Creek, a
51 navigable stream located within the jurisdiction of this court.

The complaint alleges substantially that we are here concerned with a maritime tort. The mishap, the testimony tends to show, occurred, as I have said, on a navigable stream, and the work of the deceased was of a maritime character. I instruct you that this gave to this Court jurisdiction of the subject of the action.

The complaint alleges negligence of the defendant corporation, in consequence of which the intestate lost his life, and it is necessary that that element be established by a fair preponderence of the evidence, and if that has not been done, then there can be no recovery.

Negligence is never presumed from the mere occurrence of the mishap. It must be established, either by direct evidence or by circumstantial evidence of such a nature as to lead the mind to the conclusion that the occurrence was due to the negligence, carelessness, or want of foresight of the defendant, who was the employer of the deceased at the time of the occurrence.

The evidence tends to show that at the time specified the deceased was engaged in working on a scaffold in painting some patchwork on a scow under the instructions of the witness Stoyle, who was foreman, and while standing upon this improvised scaffold a tug, without warning, backed up to a pile driver near by and close to the scaffold, and created a disturbance in the water of such a nature that the scaffold collapsed, and the deceased, before he had time to reach a place of safety, was thrown into the water and drowned. His body was recovered about thirty or forty minutes afterwards.

Now the question that is to be submitted to you is whether it was negligent on the part of the defendant or its responsible serv-
52 ants, by whom the deceased was employed, to permit the tug to approach the scaffold and create a disturbance or commotion in the water of such a nature as to cause the collapse of the scaffold, without giving notice or warning to the deceased who was at work thereon.

The claim of the plaintiff is substantially that the defendant failed to provide the deceased with a reasonably safe place to work, as it was its duty to do, and that it failed to warn him of the proximity of the tug and the danger to the scaffold from these displacement waves and commotion of the water caused by the propeller wheel.

When you come to examine the testimony as to the negligence you will find the liability of the defendant falls within a very narrow range.

The defendant in its answer denies that it was negligent and in the main contends that the occurrence happened due to the contributory negligence of the deceased, himself, and I may instruct you in passing that if you reach this conclusion from the evidence, then the plaintiff cannot recover. But before reaching any such conclusion it is necessary that you should have an understanding of the testimony, and you should carefully analyze it for the purpose of ascertaining where the truth rests.

The liability of the defendant or the liability of the deceased as

to contributory negligence, as I have already said, rests within a ver
narrow compass, but it is dependent upon conflicting testimony.

It is your province to reconcile the testimony as to what it was wit
relation to the occurrence, because if you believe the testimony of th
plaintiff that no adequate warning was given of the dange
53 then you will be justified in awarding a verdict to the plain
tiff, unless you believe from the evidence that the decease
contributed to the injury, and in consequence of which he wa
drowned. In the latter case there can be no recovery. As I hav
said, it depends upon contradictory testimony.

You are the judges of the fact, while it is the duty of the Court
explain to you the law so that you may properly apply the fac
thereto.

In your efforts to ascertain the truth you may, of course, take in
consideration the interest the parties have in the outcome of the co
troversy. You may inquire whether the fellow-workmen of the d
ceased were prejudiced, biased, or interested in any way so as to i
duce them to go upon the witness stand and color their testimon
On the other hand, you may inquire whether the witnesses for th
defendant, the superintendent of the works, Murphy, the captain
the tug, La Croix, the foreman of the works, Stoyle, whether the
are not interested, whether they are not intentionally or otherwi
desirous of showing to you that they in no way were responsible f
the mishap. Furthermore, you may take into consideration in yo
efforts to ascertain the truth, the manner in which the testimony w
given, whether it was evasive or frankly narrated. These are
indicia and bear upon the subject.

I do not think it necessary for me to refer again to the testimon
It must suffice that the plaintiff claims that the defendant was neg
gent and failed to give warning of the approach of danger, fail
to give warning of the approach of the tug and of the rushing of t
water from the propeller wheel so that the deceased might take ca
of himself and protect himself from harm.

On the other hand, it must suffice that it is the claim of t
54 defendant that it was not negligent, but that this unfort
nate occurrence was due to the want of foresight of the d
ceased himself. If you believe such to be the fact from the ev
dence, the plaintiff cannot recover, but upon that subject I will i
struct you later on.

It is quite necessary, in order that you may be able to apply t
facts to the law, that you should have an understanding of the l
with reference to such a controversy as this.

During the course of the trial the word "Negligence" has be
freely used, as has also the term "ordinary care," and you shou
have a definition of those terms in mind. By negligence, gent
men, is meant an omission to use that degree of care which is t
duty of a person to use to protect another from injury. By ordina
care is meant such a degree of care, skill and diligence as men
ordinary prudence under similar circumstances usually emplo
Since it is the claim of the plaintiff in this case that the defenda

failed to exercise ordinary care, you will at once perceive the necessity of having in mind an understanding of that term.

Both the employer and the employee owe to each other the duty of exercising ordinary care and diligence to the end on one hand that no injury should occur to the employee and on the other hand that the employee should protect himself from harm and danger.

It is a well established rule of law that the master is not the guarantor or the insurer of the safety of the workman, but nevertheless it is his duty to exercise ordinary care and diligence to provide them with a reasonably safe place in which the work may be done, and if in the course of the work the place of work becomes dangerous because of perils resuting from other work relating to his business
55 different from that in which the particular servant was employed, he is required to give warning to the workmen of the additional dangers so as to enable them in the exercise of ordinary care to avoid them and to protect himself from injury. It is not always easy, gentlemen, to determine how that should be done. In this case, however, in view of the fact that tug boats in their navigation make waves and churn the water with the propeller wheel when backing or maneuvering, it is required in the exercise of ordinary care, in my judgment, that the deceased, who was there at work upon the scaffold and engaged in his particular employment, should have had notice while there at work of the intention of the tug to approach the float and of the danger from the commotion of the water caused by the kick ahead. You will bear in mind that the master of the tug testified that he backed up close to the pile driver, so close that it became necessary to give the kick ahead in order to avoid striking the pile driver. Furthermore, he testified that the action of the propeller wheel made very little noise, and the *kick* ahead caused an increased commotion in the water, as the result of which the scaffold, upon which the deceased was working, collapsed.

I further instruct you that it was the imperative duty of the defendant to provide the deceased with a safe place to work, and this duty could not be delegated to another person to relieve it from responsibility.

It was the duty of the superintendent of the work, Murphy, to maintain the place where the deceased was at work reasonably safe, and his negligence, if you determine that there was such, in not giving notice of the approach of the tug, if you determine he did not,
is attributable to the master of the defendant. Indeed the
56 negligence of the master of the tug, if you believe he was negligent, in approaching the scaffold without giving warning to the deceased by signaling, was, in my judgment, such want of care on his part for which the master may be held liable, unless you believe from the evidence that the deceased was guilty of contributory negligence.

Further, gentlemen, there is testimony tending to show that Stoyle, the foreman of the work, who stood on the scow received notice from Murphy to warn the deceased, but that he failed to give seasonable warning to him. If you believe such to be the fact, then you may determine there was negligence on his part for failure so to do, and

his failure was attributable to the defendant, in-as-much as du
of that character,—the keeping of the place reasonably safe, as I h
stated, were non-delegable duties, and any *any* claim of negligc
of a fellow servant, assuming him to be such, which ordinarily wo
relieve the master from liability does not apply, because, as I h
said, it is the imperative duty of the master to maintain and k
a place where workmen are at work in a reasonably safe condition

Regardless, however, of any negligence of the defendant, or
persons in authority, of Stoyle or La Croix, the Master of the
there can be no recovery, I *prcat*, if the deceased was also negli
in failing to leave the scaffold if he had time to do so after warn
of his peril was given him, or if without any such warning or
tice the danger became obvious to him.

You must determine from the proof that the defendant alone
negligent and remiss in its duty in this regard.

The deceased was required to exercise ordinary care and cau
to protect himself from harm, and if he contributed by
57 negligence to the catastrophe the plaintiff cannot recove

Now what is the testimony as to the contributory negligc
of the deceased? I do not intend to refer to the evidence in
case to any extent, and whatever allusion I may make to it is me
for the purpose of making my instructions as clear as possible.

You will remember that Murphy testified that when the
passed down the river and was opposite the scow he called to St
to get the man off the float, that the tug was going to back in.
claims that he saw the deceased standing on the scaffold not
distant from where Stoyle was, and that he called out in such a l
tone of voice he thought the deceased must have heard it. In
event he testified that, though he did not understand what St
said, Stoyle turned towards the deceased, and you will bear in mi
gentlemen, that La Croix, the Master of the tug, gave testim
which it is claimed is corrobatory in that regard, namely, t
notice was shouted to Stoyle by Murphy that the tug was ab
to take the scow away. Furthermore, you will bear in mind t
Stoyle testified that he called to the deceased to jump or he wo
have wet feet, or something to that effect.

It is from such testimony that the defendant asks you to beli
that the deceased failed to exercise that ordinary degree of c
which the law required him to exercise, and that he failed to g
heed to the warning which was given, and by reason thereof
contributed to his death. If you find such to be the fact then
administratrix cannot recover.

By contributory negligence, gentlemen, is meant want of ordin
care by the person injured which proximately contributed
58 his negligence to the mishap and consequences thereof.

It must be proven affirmatively that the deceased was giv
a seasonable warning and that he failed to heed the warning or t
he had knowledge of the approaching danger, or sufficient reason
anticipate it to put an ordinary careful man on his guard. He w
however, not bound to anticipate that the defendant would comm
an act of negligence; he was not bound to anticipate that the t

would approach without giving him notice, and he was not bound to be aware of the danger he was in by remaining upon the float; he was not bound to anticipate that the tug would approach in such a way to create a commotion in the water of sufficient force to swamp the float or that insufficient time would be given him to reach the pile driver or place of safety.

The burden of proof is on the defendant to establish contributory negligence of the deceased by a fair preponderence of the evidence, while, on the other hand, the burden of proof of establishing sole negligence of the defendant rests upon the plaintiff.

If you reach the conclusion that the defendant solely was negligent in failing to warn the deceased of the approaching menace or danger, in consequence of which the plaintiff intestate was drowned, then the next question you are obliged to consider is the question of damages.

You are obliged to ascertain from the evidence what amount would reasonably compensate the plaintiff and her children, survivors of the deceased, for the loss they have sustained in the death of the husband and father. The plaintiff in such a situation as this, if you believe the death of the deceased was caused by the
59 negligence of the defendant alone, is entitled to recover compensatory damages. She has the right to be made whole by the jury for whatever loss she has sustained; but you are not permitted to punish the defendant or to give exemplary damages in your efforts to fairly and justly compensate her for her loss, but you have the right to take into consideration that the deceased at the time of his death was of the age of twenty-seven years and his expectancy of life was thirty seven and forty-two one-hundredths years; that he was strong and healthy; that he provided well for his family; that he was able to earn six dollars and forty cents per day, or eighty cents an hour; that he left him surviving, besides his widow, two children, one six years of age and the other three. You may take into consideration the amount of his earnings and that he would have contributed annually to the support of his family and to the education of his children in the years to come. In addition, gentlemen, you may take into consideration that the subject matter in the outstart was before the Compensation Commissioner of the State of New York and that an award of eleven dollars and fifty-four cents per week was made to the widow and children in compensatioi of their loss, and that the widow received in the aggregate $1,045.60, including $100.00 for funeral expenses, and that subsequently the Compensation Board reached the conclusion, on motion of the defendant, that it did not have jurisdiction to make an award, and thereafter discontinued it.

If you reach the conclusion that the plaintiff is entitled to recover compensation, then you should deduct from the amount of your verdict the total amount that has previously been paid to her, namely, $1,045.60.

On the other hand, gentlemen, as I have endeavored to make plain to you, if you reach the conclusion that the defendant has

maintained the burden of proof, then the loss falls upon th
60 plaintiff. If it has shown to your satisfaction by a fair pre
ponderance of the evidence that the drowning of the deceased
was due to his own carelessness or negligence, that he had adequat
and seasonable warning of the approach of the tug and danger, ther
your verdict should be one of no cause of action. Take the case.

Plaintiff's counsel, Mr. Cole, then excepted to the charge of th
court and requested the court to charge as follows:

"If your Honor please, I desire to except to that portion of You
Honor's charge wherein you have charged that if the plaintiff wa
guilty of contributory negligence or if the deceased was guilty th
plaintiff cannot recover, and in that behalf I ask the Court to charg
the rule of the maritime law providing that there may be a divisio
of damage in case the jury find the deceased was guilty of con
tributory negligence."

This request the Court denied to which plaintiff's counsel dul
excepted.

The defendant then took exception to the charge of the Court t
the jury as follows:

Mr. Thomas: I except to the charge of the court to the jury tha
this Court has jurisdiction of the subject matter and that the work
performed was of a maritime character. We except to that part o
the charge where the Court charges that the failure on the part o
the Captain to give warning of the approach of the tug by a signa
was negligent. We also except to that part of Your Honor's charg
that any failure on the part of the foreman Stoyle to give warning
of the approach of the tug was negligent.

The Court: I did not intend to instruct the jury that his failur
to give a signal in view of the circumstances was negligence, but
merely alluded to it as an item which they might take into con
sideration as bearing upon the question of negligence.

Mr. Thomas: We except to that part of Your Honor's charg
where you submit to the jury the question as to whether the acciden
was due to the failure to give warning of the approach of danger
We except to the instructions to the jury that if the jury believ
from the testimony that no warning of danger was given they woul
be justified in finding for the plaintiff, unless they believe the de
ceased was guilty of contributory negligence. We except to th
charge wherein the Court charged that it was required that th
deceased should have notice of the approach of the tug and danger
from the commotion in the water.

The defendant then requested the Court to charge the jury tha
if they find that neither Stoyle nor Murphy, nor La Croi
61 had reasonable cause to believe that the action of the tu
would precipitate the deceased into the water then the plain
tiff cannot recover, which request was denied, and the defendan
duly excepted to the ruling of the Court in that behalf. The jury
then retired to consider their verdict and having returned int
court a verdict for the plaintiff in the sum of $12,500 in favor of th

plaintiff, exclusive of the $1,045 which had been paid to the plaintiff, as appears from the testimony, the defendant afterwards, and to wit, on the same day, namely, the 21st of April, 1922, moved the Court to set aside the verdict and to grant it a new trial upon each of the following grounds:

1. That the verdict was contrary to law.

2. That it was contrary to the evidence.

3. On account of errors of law committed upon the trial and in the instructions to the jury.

4. Upon the ground that the verdict was excessive in amount and the defendant also moved the Court for judgment, notwithstanding the verdict, dismissing the complaint, upon the ground that upon the evidence the defendant was entitled, as a matter of law, to a dismissal of the complaint, and that no new facts or different facts could be developed upon a new trial which could change the situation and result in the plaintiff being entitled to recover.

The Court having entertained the said motion, the same was subsequently and on the 29th day of April, 1922, argued by counsel for the plaintiff and defendant respectively, and after such argument and after due consideration by the Court, was on the 29th day of May, 1922, overruled and denied.

And the term of Court at which said cause was tried having been from time to time duly extended up to the date hereof, and in furtherance of justice and that right may be done to the de-
62 fendant Great Lakes Dredge and Dock Company, the said defendant tenders and presents the foregoing as its Bill of Exceptions in this cause of action to the Court and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record, and the same is accordingly done this 19th day of August, 1922.

JOHN R. HAZEL,
United States District Judge.

O. K. as to form.
I. W. C.

62½ [Endorsed:] Civ. 2127. United States District Court, Western District of New York. At Law. Sophia Kierejewski, as Administratrix of the personal estate of Leo Kierejewski, deceased, Plaintiff, vs. Great Lakes Dredge and Dock Company, Defendant. Bill of Exceptions. U. S. Thomas, Attorney for Defendant. 709 White Building, Buffalo, N. Y. Filed Aug. 23, 1922, at — o'c- — m. Harris S. Williams, Clerk.

63 5. *Judgment.*

United States District Court, Western District of New York.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estat
Leo Kierejewski, Deceased, Plaintiff,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY, Defendant.

Please take notice that a judgment of which the within is a
copy was duly granted, filed, docketed, and entered in the Un
States Court for the Western District of New York, at the offic
the Clerk of said court in the Post Office Building in the City
Buffalo, N. Y., on the 3rd day of June, 1922, at 10 o'clock A. M

Yours, &c.,

IRVING W. COLE,
Attorney for Plaintiff

Office & P. O. Address, 1005 D. S. Morgan Bldg., Buffalo, N. Y

To Ulysses S. Thomas, Attorney for Defendant.

64 District Court of the United States, Western District of
York.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estat
Leo Kierejewski, Deceased, Plaintiff,

vs.

GREAT LAKES DREDGE & DOCK COMPANY, Defendant.

The above entitled action having been commenced in the Supr
Court of the State of New York by delivering the summons the
into the hands of the Sheriff of Erie County, New York, the p
and county where said action was brought, on April 16, 1921
service of said summons upon defendant, and with the intention
the same should be so served, and said summons having been actu
personally served on the 25th day of May, 1921, and the defen
having appeared in said action in said State court by due notic
apearance by Ulysses S. Thomas, as its attorney, on June 25th, 1
and plaintiff's complaint having been duly served upon defend
attorney on July 16, 1921, and said action having been remove
the United State*d* Court for the Western District of New York
application of defendant through said attorney, on the groun
diversity of citizenship, the said defendant being a corpora
organized and existing under the laws of the State of New Je
on the 2nd day of August, 1921, and defendant having serve
answer to said complaint after such removal on August 25th, 1
and plaintiff having replied to said answer on August 31st, 1

and said action having been noticed for trial in said United States District Court on September 2nd, 1921, which notice was filed with the Clerk of said District Court on September 27th, 1921, and plaintiff having filed a supplementary reply to said answer in said District Court on October 21st, 1921, and having served a copy of the same on defendant's attorney on October 22nd, 1921, and plaintiff having moved for the amendment of her complaint on October 28, 1921, and an order having been made by this court permitting and directing the amendment of her complaint in accordance with the amended complaint hereto attached, and said amended complaint having been duly filed in this court and served upon defendant's attorney, and said defendant's attorney having answered said amended complaint and caused said answer to be duly filed with Clerk of this court, and the plaintiff having replied to said answer and caused said reply to be duly filed with this court, and this action having been brought and tried and the recovery had under sections, 130, 131, 132, 133, and 134 of the Decedent Estate Law of the State of New York, formerly sections 1902, 841-*b*, 1903, 1904 of the Code of Civil Procedure of the State of New York, to recover damages for the death of Leo Kierejewski, plaintiff's intestate, which death occurred April 21, 1919, caused by the negligence and wrongful acts of defendant, and after issue duly joined in said District Court of the United States said action having been brought to trial at a stated term of said court and duly tried at said term in the City of Buffalo, New York, in and for said Western district of New York on the 20th and 21st days of April, 1922, before Hon. John R. Hazel, District Judge, and a jury, and said jury having rendered a verdict in favor of plaintiff in the sum of $12,500.00, and said verdict having been duly reported to said court and duly entered, filed and recorded therein.

65

Now, on motion of Irving W. Cole, attorney of record for plaintiff, it is

Ordered, adjudged, and decreed, that the plaintiff recover of the defendant the sum of $12,500.00, the amount of the said verdict together with the sum of $2,333.33, interest on said verdict from the date of the death of plaintiff's intestate, viz: April 21st, 1919, pursuant to section 132 of the Decedent Law, also together with the sum of $82.55 costs and disbursements to plaintiff duly taxed by the Clerk of said District Court, in all amounting to the sum of $14,915.88, for which sum plaintiff is hereby awarded judgment and may have execution against defendant.

Judgment filed, docketed and entered this 3rd day of June, 1922, at 11.15 A. M.

(Signed) HARRIS S. WILLIAMS,
Clerk.

[Endorsed:] Civ. 2127. U. S. District Court, Western District of N. Y. Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff, vs. Great Lakes Dredge & Dock Co., Defendant. Judgment. Irving W. Cole, Attorney for Plaintiff, 707 D. S. Morgan Bldg., Buffalo, N. Y. Filed Jun. 3, 1922, at 11:15 o'c. A. M. Harris S. Williams, Clerk.

66 6. *Memorandum of Hazel, D. J., Denying Defendant's M for New Trial.*

District Court of the United States, Western District of New

SOPHIA KIEREJEWSKI, as Administratix of the Personal Esta Leo Kierejewski, Deceased,

against

GREAT LAKES DREDGE & DOCK COMPANY.

On Motion for a New Trial.

Irving W. Cole, Esq., Buffalo, New York, for Plaintiff.
Ulysses S. Thomas, Esq., Buffalo, New York, for Defendan

HAZEL, *District Judge:*

It would serve no useful purpose for me, in view of the r decisions by the Supreme Court, (Jensen, Rhode and Garcia c and the Circuit Court of Appeals, (Netherlands etc. vs. Gaallag bearing upon the questions involved, to now apply a different ciple than the one that applied and adopted at the trial. Th fendant company admits that the tort was of a maritime nature that the service at the time of drowning related to a maritime se Its insistence that the general contract of employment of th ceased established the ordinary relations of master and servan tween him and the defendant and hence plaintiff should hav course to the Workmen's Compensation Act of the state is a que in my mind not wholly free from doubt, but as defendant inten sue out a writ of error if the decision is against it, I think it no proper, in view of the circumstances, to resolve any doubt I ente in plaintiff's favor and hold that it also appears herein that th ployment of the deceased was in the nature of a maritime con Motion for new trial denied.

Dated May, 1922.

JOHN R. HAZEL,
D.

[Endorsed:] Civil. #2127. United States District Court, ern District of New York. Sophia Kierejewski, as Admx. o Personal Estates of Leo Kierejewski, deceased, against Great L Dredge & Dock Co. Memorandum. Hazel, D. J. Filed Ma 1922. Harris S. Williams, Clerk.

67 United States District Court, Western District of New York.

At Law.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY, Defendant.

7. Assignment of Errors.

Now comes the defendant Great Lakes Dredge and Dock Company and files the following assignment of errors upon which it will rely in the prosecution of the writ of errors in this cause to reverse the judgment of the Court entered herein on the 3rd day of June, 1922.

I.

The Court erred in overruling the motion made by the defendant at the close of the plaintiff's case for a non-suit upon the ground that the Court has no jurisdiction of the case.

II.

The Court erred in overruling the motion of the defendant made at the close of all the evidence for a non-suit upon the ground that the Court had no jurisdiction of the suit.

III.

The Court erred in overruling the motion for the defendant made at the close of all the evidence for a dismissal of the com-
68 plaint upon the ground that the cause was not within the jurisdiction of the Court.

IV.

The Court erred in charging the jury that the Court has jurisdiction of the subject matter of the suit.

Wherefore the defendant prays that the said judgment be reversed and that there be done what of right and justice ought to be done in the premises.

U. S. THOMAS,
Attorney for Defendant.

709 White Building, Buffalo, N. Y.

Dated Buffalo, N. Y. this 17th day of August, 1922.

[Endorsed:] Civ. 2127. United States District Court, Western District of New York. At Law. Sophia Kierejewski, as administratrix of the personal estate of Leo Kierejewski, deceased, Plaintiff, vs. Great Lakes Dredge and Dock Company, Defendant. Assignment of Errors. U. S. Thomas, Attorney for defendant, 709 White Building, Buffalo, N. Y. Filed Aug. 23, 1922. Harris S. Williams, Clerk.

69 8. *Order Allowing Writ of Error.*

United States District Court, Western District of New York.

At Law.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff,

against

GREAT LAKES DREDGE & DOCK COMPANY, Defendant.

The above named defendant having duly filed and presented its petition praying for the allowance of a writ of error in this cause, directing the Clerk of this Court to send a duly authenticated transcript of the record and proceedings and papers upon which the judgment herein was made and entered be sent to the Supreme Court of the United States and having filed its assignment of errors and having presented a bond in the penal sum of $20,000.00 conditioned as required by law and the rules of Court,

Now, upon motion of Ulysses S. Thomas, attorney for said defendant, it is

Ordered that the said petition be granted and that the Writ of Error be issued as prayed for, and it is further

Ordered that the amount of the bond to be filed by the defendant upon said Writ of Error be and the same is hereby fixed at $20,000.00 and it is further

Ordered that the bond presented with said petition be and the same is hereby approved and that upon filing the same it shall operate as a supersedeas.

Dated Buffalo, New York, August 19, 1922.

JOHN R. HAZEL,
U. S. District Judge.

[Endorsed:] Civ. 2127. United States District Court, Western District of New York. At Law. Sophia Kierejewski, as administratrix of the personal estate of Leo Kierejewski, deceased, plaintiff, against Great Lakes Dredge and Dock Company, defendant. Order Allowing Writ of Error. Ulysses S. Thomas, Attorney for Defendant, 719 White Bldg., Buffalo, N. Y. Filed Aug. 23, 1922. Harris S. Williams, Clerk.

70 9. *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the United States District Court for the Western District of New York, Greeting:

Because in the Record and proceedings, as also in the rendition of a Judgment of a Plea which is in the said District Court before you between Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, deceased, plaintiff and Great Lakes Dredge and Dock Company, Defendant, a manifest error hath happened to the great damage of the said Defendant as by its complaint appears and we being willing that Error, if any hath been, should be duly corrected and full and speedy justice done to the parties of the aforesaid in this behalf do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this Writ so that you have the same at Washington on the 22nd day of September, 1922, next in the said Supreme Court to be then and there held; that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that Error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. William H. Taft, Chief Justice of the Supreme Court the 23rd day of August, A. D. 1922.

HARRIS S. WILLIAMS,
Clerk of the U. S. District Court for the Western District of New York.

Allowed.
JOHN R. HAZEL,
U. S. District Judge.

[Endorsed:] Civ. 2127. United States District Court Western District of New York. At Law. Sophia Kierejewski, as Administratrix of the personal estate of Leo Kierejewski, deceased, Plaintiff, against Great Lakes Dredge and Dock Company, Defendant. Writ of Error. Ulysses S. Thomas, Attorney for Defendant, 719 White Bldg., Buffalo, N. Y. Filed Aug. 23, 1922. Harris S. Williams, Clerk.

71 10. *Certified Question.*

United States District Court, Western District of New York.

At Law.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff,

against

GREAT LAKES DREDGE AND DOCK COMPANY, Defendant.

Certified Question for Review.

The above named defendant having sued out a writ of error from the Supreme Court of the United States to review the judgment herein insofar as the jurisdiction of this Court is involved, and having applied to this Court to have the question of jurisdiction certified,

Now Therefore, I, the undersigned, District Judge of the United States for the Western District of New York, do hereby certify to the Supreme Court of the United States the following question for review upon said writ of error, to wit;

In view of the provisions of the Workmen's Compensation Act of the State of New York purporting to vest exclusive jurisdiction of the plaintiff's claim for compensation on account of the death of plaintiff's interstate in the Commission created by that Act, and to exclude every other remedy did the District Court of the United States for the Western District of New York have Jurisdiction to entertain and determine the plaintiff's claim for damages against the defendant arising out of the death of plaintiff's intestate?

In witness whereof the foregoing is certified under my hand and seal of this Court to the Supreme Court of the United States.

JOHN R. HAZEL,
United States District Judge.

Dated Buffalo, N. Y., August 19, 1922.

[Endorsed:] #2127. United States District Court Western District of New York. At Law. Sophia Kierejewski, as administratrix of the personal estate of Leo Kierejewski, deceased, Plaintiff, against Great Lakes Dredge and Dock Company, Defendant. Certified Question for Review. Ulysses S. Thomas, Attorney for Defendant, 719 White Bldg., Buffalo, N. Y. Filed Aug. 23, 1922. Harris S. Williams, Clerk.

2 11. *Prayer for Reversal.*

To the Honorable the Supreme Court of the United States:

GREAT LAKES DREDGE AND DOCK COMPANY, Plaintiff in Error,

against

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Defendant in Error.

Now comes Great Lakes Dredge and Dock Company the Plaintiff in Error and prays for a reversal of the Judgment of the District Court of the United States for the Western District of New York, entered in the Office of the Clerk of said District Court on the 3rd day of June, 1922.

Dated Buffalo, New York, August 17, 1922.

ULYSSES S. THOMAS,
Attorney for Plaintiff in Error.

Office & P. O. Address, 719 White Building, Buffalo, N. Y.

[Endorsed:] Civ. 2127. United States District Court Western District of New York. At Law. Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski Deceased Plaintiff, against Great Lakes Dredge & Dock Company, Defendant. Prayer for Reversal. Ulysses S. Thomas, Attorney for Defendant, 719 White Building, Buffalo, N. Y. Filed Aug. 23, 1922. Harris S. Williams, Clerk.

3 12.

UNITED STATES OF AMERICA, *ss:*

To Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the City of Washington, D. C. on the 22nd day of September, 1922, pursuant to a Writ of Error filed in the office of the Clerk of the United States District Court for the Western District of New York wherein Great Lakes Dredge and Dock Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error should not be corrected and why speedy justice should not be done to the parties in their behalf.

Witness the Hon. William H. Taft, Chief Justice of the United States this 23rd day of August, A. D. 1922.

[Seal of United States District Court, Western District of New York.]

JOHN R. HAZEL,
U. S. District Judge.

73½ [Endorsed:] Civ. 2127. United States District Court, Western District of New York. At law. Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff, against Great Lakes Dredge and Dock Company, Defendant. Citation (original). Ulysses S. Thomas, Attorney for Defendant, 719 White Building, Buffalo, N. Y. Due and personal service of a copy of the within citation and notice of entry thereof is hereby admitted this 28th day of August 1922. Irving W. Cole Attorney for Plaintiff.

74 13. *Stipulation.*

District Court of the United States, Western District of New York

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff,

against

GREAT LAKES DREDGE AND DOCK COMPANY, Defendant.

Stipulation as to What Transcript of Record Shall Contain.

It is hereby stipulated between the attorneys for plaintiff in error and defendant in error that only the following portions of the record shall constitute the transcript of the record on appeal in the above case:

1. Amended Complaint.
2. Answer.
3. Clerk's minutes of trial.
4. Bill of Exceptions.
5. Judgment.
6. Memorandum of Hazel, D. J., denying defendant's motion for new trial.
7. Assignment of Errors.
8. Order Allowing Writ of Error.
9. Writ of Error.
10. Certified Question.
11. Prayer for Reversal.
12. Citation.
13. Stipulation.

ULYSSES S. THOMAS,
Attorney for Defendant in Error.
IRVING W. COLE,
Attorney for Plaintiff in Error.

[Endorsed:] Civ. 2127. United States District Court Western District of New York. At Law. Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff, against Great Lakes Dredge and Dock Company, Defendant. Stipulation. Ulysses S. Thomas, Attorney for Defendant 719 White Building Buffalo, N. Y. Filed Aug. 23, 1922. Harris S. Williams, Clerk.

75 & 76 Supreme Court of the United States.

GREAT LAKES DREDGE AND DOCK COMPANY, Plaintiff in Error.

vs.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Defendant in Error.

Designation of Parts of Record for Printing.

To the Clerk of the Supreme Court:

The plaintiff in error in the above entitled cause intends to rely upon the whole of the record therein as certified by the Clerk of the District Court and designates the whole of said record as material to be printed.

Dated Buffalo, N. Y., September 21, 1922.

GEORGE CLINTON, JR.,
Counsel for Plaintiff in Error.

1012 Prudential Building, Buffalo, N. Y.

To the Clerk of the Supreme Court:

The Defendant in error consents to a hearing upon the record in this cause as designated by the Plaintiff in error.

Dated Buffalo, N. Y. September 21 1922.

IRVING W. COLE,
Counsel for Defendant in Error.

77 [Endorsed:] 633—29183. Supreme Court of the United States. Great Lakes Dredge and Dock Company, Plaintiff in Error, vs. Sophia Kierejewski, as Administratrix of the personal estate of Leo Kierejewski, deceased, Defendant in Error. Designation of parts of record for priting. George Clinton, Jr., Counsel for Plaintiff in Error, 1012 Prudential Building, Buffalo, N. Y.

78 [Endorsed:] File No. 29183. Supreme Court U. S., October Term, 1922. Term No. 633. Great Lakes Dredge & Dock Co., Pl'ff in Error, vs. Sophia Kierejewski, as Adm'x. Designation by plaintiff in error of parts of record to be printed and consent to hearing on such designation. Filed Sept. 22, 1922.

79 [Endorsed:] United States Supreme Court. Great Lak
Dredge & Dock Co., Plaintiff in Error, Defendant below, v
Sophia Kierejewski, As Administratrix of the Personal Estate
Leo Kierejewski, Deceased, Defendant in Error, Plaintiff belo
Transcript of Record on Writ of Error.

Endorsed on cover: File No. 29,183. W. New York D. C. U.
Term No. 633. Great Lakes Dredge and Dock Company, plainti
in error, vs. Sophia Kierejewski, as administratrix of the person
estate of Leo Kierejewski, deceased. Filed October 2nd, 1922. Fi
No. 29,183.

Supreme Court of the United States, October Term, 1922.

No. 633.

GREAT LAKES DREDGE & DOCK COMPANY, Plaintiff in Error,

vs.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased.

In Error to the District Court of the United States for the Western District of New York.

It appearing that there have been omitted from the printed record, but through no fault of the printer or of the Clerk of this court, the following papers and entries, properly part of the record.

(1). The reply of plaintiff duly filed in the District Clerk's office, December 12, 1921, of which the following is a copy:

United States District Court, Western District of New York.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff,

vs.

GREAT LAKES DREDGE & DOCK COMPANY, Defendant.

Now comes the above named plaintiff and makes reply to the new matter set up in defendant's answer not in the nature of denial or purely as defenses:

First. Denies that if any negligence other than the negligence of interstate caused or contributed to cause said accident and resultant death of plaintiff's intestate, it was the negligence of a competent fellow servant, or fellow servants, then in the service of defendant with said intestate.

Second. Denies that the accident and resultant death as set forth in the complaint occurred while plaintiff's intestate was at work in an employment into which he had voluntarily entered knowing the hazards thereof and expecting and assuming the same by entering into and continuing such work.

Third. Denies knowledge or information sufficient to form a belief as to the allegations of said answer contained in paragraph seventeen thereof, excepting that plaintiff admits defendant is a foreign corporation organized under the laws of New Jersey, and denies the allegation thereof that the causes of action set forth in the complaint did not accrue to plaintiff within two years next preceding the commencement of this action.

Fourth. Answering paragraph eighteen of said answer, plaintiff denies knowledge or information sufficient to form a belief with

reference to the allegations thereof, and, therefore, denies the same, excepting that defendant conducted the business of dredging and dock building in the State of New York, and that plaintiff's intestate was in its employ at the time of his death, and in that behalf plaintiff alleges in reply to the allegations contained in said paragraph that application was made by the widow of plaintiff's intestate to the State Industrial Commission for compensation under the Workmen's Compensation Act, and that on or about May 5th, 1919, said State Industrial Commission made an award of $34.62, being for three weeks at $11.54 per week, the future payments to be $23.08 bi-weekly.

Plaintiff admits that defendant paid some amounts under said award but the exact amount of said payments plaintiff is unable to state and demands proof thereof on the part of defendant.

Further answering the allegations contained in said paragraph, plaintiff alleges that before said award was paid, and on February 25, 1921, said State Industrial Commission by due proceedings revoked, rescinded and cancelled said award and dismissed the claim of plaintiff and the children of plaintiff and intestate for compensation under the Workmen's Compensation Act, and said award then became null and void and of no effect whatsoever.

Further replying to the allegations contained in said paragraph eighteen, plaintiff denies that any amount paid by defendant as aforesaid under and by virtue of said illegal award which was cancelled, revoked, and dismissed, is a proper set-off against the claim of the plaintiff in this action.

Fifth. Replying to paragraph nineteen of said answer plaintiff alleges and declares that she is not required to plead to the same.

Wherefore, plaintiff demands judgment as demanded in the complaint with costs.

MATTHEW W. BENNETT,
Attorney for Plaintiff.

Office and P. O. Address, 710 Ellicott Square, Buffalo, N. Y.

(Endorsed:) United States District Court for Western District of N. Y. Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased, Plaintiff, vs. Great Lakes Dredge & Dock Co., Defendant. Plaintiff's reply. Matthew W. Bennett, Attorney for Plaintiff. 710 Ellicott Square, Buffalo, N. Y. Filed Dec. 12, 1921. Harris S. Williams, Clerk. Personal service is hereby admitted of a copy of the within. Ulysses S. Thomas, Defendant's Attorney.

(2). The following:

"Said motion for a new trial was afterwards and on April 12, 1922, granted and the order so granting entered on that date,"

(3). The following:

"On January 21, 1922, an order was duly made and filed substituting Irving W. Cole in the place of Matthew W. Bennett, as attorney of record for plaintiff."

(4). Clerk's minutes of the second trial as follows:

United States District Court, Western District of New York.

Civ. 2127.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased,

vs.

GREAT LAKES DREDGE & DOCK CO.

Clerk's Minutes of Trial.

Apr. 20, 1922.

Appearances:

For plaintiff, Irving W. Cole.
For Defendant, Ulysses S. Thomas, George Clinton, Jr.
Case moved by plaintiff's attorneys.
Ordered that a jury be empannelled herein and that the trial of this action do now proceed.
Whereupon the following jurors were called and sworn:

1. Charles E. Henry.
2. Lawrence Porter.
3. Frank P. Weber.
4. Louis Stern.
5. Jesse G. Bartoo.
6. Washington Bullard.
7. Wilford A. Briggs.
8. Peter W. Henkel.
9. Thomas Armstrong.
10. Grove E. Sly.
11. Louis A. Sasse.
12. Frank Ruskiewicz.

Mr. Cole opens the case to the jury for the plaintiff.
Witnesses for plaintiff: Edward H. Thomas, Joseph W. Busch, Edward Zgoda, Frank Coffey, Sophia Kierejewski, Matthew W. Bennet, John A. Gladkowski.
Plaintiff here rests.
Defendant moves to dismiss 2nd Count of action. Granted on plaintiff's consent thereto.
Defendant's counsel here moves for a non suit and a dismissal of the complaint.
Decision reserved until after defendant's proof.
Witnesses for defendant: Bert J. Wall, Jeremiah J. Murphy, Robert Stoyle, Josephus A. La Croix.
Defendant here rests.
Plaintiff here rests.

Same appearances. Apr. 21, 1922.

Trial resumed.

Defendant's counsel here renews its motion for a non suit and asks for a dismissal of the complaint.

Denied and exception.

Mr. Thomas here sums up the case for the defendant.

Mr. Cole here sums up the case for the plaintiff.

The jury after listening to a charge from his Honor the Judge retire- at 12 M. in the custoday of sworn officers to deliberate upon their verdict.

The jury come into Court at 2:30 P. M. and after asking for and receiving further instructions from His Honor the Judge again retire- in the custody of sworn officers to deliberate upon their verdict.

The jury come into court at 3 P. M. and say they find a verdict for the plaintiff for $12,500.00.

The counsel for defendant moves for a new trial on the minutes. Also for judgment dismissing the complaint.

Motion held for April 29th.

Apr. 29, 1922.

Argument of motion.

Appearances Irving Cole & Geo. Clinton.

Term of court extended 60 days after decision of motion for new trial to prepare and settle bill of exceptions.

Taken under advisement. Briefs to be filed if deemed necessary in addition to those filed on argument.

Now, therefore, it is hereby stipulated by and between counsel for the parties, that the above entries and papers be printed separately and attached at the end of the printed transcript of record, and that an entry be made at the end of page 9 of said printed transcript, referring to said reply and that entries be made at the end of folio 14 after the word "held", page 11 of said transcript of record referring to the other of the above entries in the order in which they above appear.

IRVING W. COLE,
Counsel for Deft. in Error.
GEORGE CLINTON, Jr.,
Counsel for Plaintiff in Error.

[Endorsed:] U. S. Supreme Court, October Term, 1922. No. 633. Great Lakes Dredge & Dock Company, Plaintiff in Error, vs. Sophia Kierejewski, as Administratrix of the Personal Estate of Leo Kierejewski, Deceased. In Error to the District Court of the United States for the Western District of New York. Original Stipulation. Irving W. Cole, Attorney for Defendant in Error, 1,005 D. S. Morgan Building, Buffalo, N. Y.

[Endorsed:] File No. 29,183. Supreme Court of U. S., October Term, 1922. Term No. 633. Great Lakes Dredge & Dock Co., P. E., vs. Sophia Kierejewski, as Administratrix, etc. Stipulation and addition to record, Filed Dec. 4, 1922.

Office Supreme Co
FILE
OCT 2 1
WM. R. STA

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 633

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-in-Error,

vs.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of LEO KIEREJEWSKI, deceased,
Defendant-in-Error.

Notice of Motion, Affidavit and Waiver and Consent to Advance on the Docket and Brief

IRVING W. COLE,
Attorney of record and counsel for Sophia Kierejewski, as Administratrix, etc. plaintiff in the court below, and defendant-in-error in this court,
Office and P. O. Address,
1005 D. S. Morgan Bldg.,
Buffalo, N. Y.

ULYSSES S. THOMAS,
Attorney of record for Plaintiff-in-error,
Office and P. O. Address,
719 White Bldg.,
Buffalo, N. Y.

GEORGE CLINTON, JR.,
Counsel for said Plaintiff-in-error,
Office and P. O. Address,
1012 Prudential Bldg.,
Buffalo, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

Supreme Court

OF THE UNITED STATES

OCTOBER TERM, 1922.

No.....

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-in-Error,

vs.

SOPHIA KIEREJEWSKI, as Administratrix of the Estate of LEO KIEREJEWSKI, Deceased,
Defendant-in-Error.

Sirs:

PLEASE TAKE NOTICE, that upon the record docketed in this court in the above entitled case and the annexed affidavit of Irving W. Cole, counsel for defendant-in-error, verified September 22nd, 1922, showing that this case is brought here by writ of error from the U. S. District Court for the Western District of New York direct to this court by defendant below, Great Lakes Dredge & Dock Company, and that the only ques-

tion in issue is the question of the jurisdiction of the court below; and on the annexed waiver and consent of plaintiff-in-error by George Clinton, Jr., its counsel; a motion will be made at the opening of the October Term of this court on October 2nd, 1922, at the Court Room of this court in the City of Washington, D. C., at ten o'clock, A. M., on that day, or as soon thereafter as counsel can be heard, for an order advancing this case on the docket pursuant to Rule 32 of this court for the reason that the only question in issue in this court is the question of the jurisdiction of the court below; to be heard under the rules prescribed by Rule 6 of this court.

Dated September 22nd, 1922.

Yours &c.,

IRVING W. COLE,
Attorney of Record for Sophia Kierejewski, as Administratrix, etc., plaintiff in the court below, defendant-in-error in this court, and also counsel for said party,
Office and P. O. Address,
1005 D. S. Morgan Bldg.,
Buffalo, N. Y.

To

Ulysses S. Thomas,
Attorney of Record for Plaintiff-in-Error,
Office and P. O. Address,
719 White Bldg.,
Buffalo, N. Y.

And to
George Clinton, Jr.,
Counsel for said Plaintiff-in-Error,
Office and P. O. Address,
1012 Prudential Bldg.,
Buffalo, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No.....

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-in-Error,
vs.
SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of LEO KIEREJEWSKI, Deceased,
Defendant-in-Error.

State of New York,
County of Erie,
City of Buffalo, } ss.:

IRVING W. COLE, being duly sworn, deposes and says that he is attorney of record and counsel for the above named defendant-in-error.

That this action was commenced in the Supreme Court of the State of New York to recover damages for the death of Leo Kierejewski, husband and intestate of the above named Sophia Kierejewski, alleged to have been caused by the wrongful and negligent acts of commission and omission on the part of Great Lakes Dredge & Dock Company, the above named plaintiff-in-error, employer of said intestate.

That previous to the commencement of said action the said widow of said intestate made application to the New York State Industrial Commission for an award under the New York Workmen's Compensation Act, the said accident and death having occurred in the State of New York, and after being at first granted, said application was finally cancelled and disallowed by said commission on the application of the above named plaintiff-in-error for the reason that this is a maritime case of such a nature as to exclude said local Workmen's Compensation Act. That the decision of said Industrial Commission so dismissing said application was duly filed and entered according to law and neither party to said application appealed therefrom.

Then this action was commenced as aforesaid and upon the application of the defendant therein the Great Lakes Dredge & Dock Company, plaintiff in-error here, this action was removed from the State to the United States District Court for the Western District of New York on the ground of diversity of citizenship, the plaintiff Sophia Kierejewski, residing in the State of New

York where said accident and death occurred and the defendant being a corporation and resident of the State of New Jersey.

That said action was tried in the United States District Court for the Western District of New York and resulted in a judgment for plaintiff, Sophia Kierejewski, which was docketed and entered on June 3rd, 1922. That the defendant in said action, plaintiff-in-error here, claimed upon said trial that said United States District Court did not have jurisdiction for the reason that the case is not of such a maritime nature as to exclude the said local Workmen's Compensation Act, and that the sole and exclusive remedy of plaintiff was and is under said Act.

Upon that ground alone a writ of error was sued out in said District Court direct to the Supreme Court of the United States and said question certified by the District Judge of said court, and comes here upon said writ of error, and certificate, assignment of error, and bill of exceptions which show the facts as above stated.

That the record in this case has been made up and duly filed and docketed in the Supreme Court of the United States and now awaits a hearing in said court.

IRVING W. COLE.

Subscribed and sworn to before me
this 22nd day of September, 1922.
Edna E. Briggs,
Notary Public,
Erie County, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No.....

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-in-Error,

vs.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of LEO KIEREJEWSKI, Deceased,
Defendant-in-Error.

And now comes the above named plaintiff-in-error by George Clinton, Jr., its counsel, and hereby waives formal notice of the motion made by defendant-in-error for the advancement of this case on the docket of the Supreme Court of the United States, and hereby consents that this case may be advanced upon said docket pursuant to said motion; and said plaintiff-in-error, by said counsel, agrees and consents that the only question at issue under the writ of error herein is the jurisdiction of the court below.

Dated, September 22nd, 1922.

GEORGE CLINTON, JR.,
Counsel for Great Lakes Dredge & Dock Company, above named Plaintiff-in-Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No.....

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-in-Error,

vs.

SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of LEO KIEREJEWSKI, Deceased,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR ON MOTION TO ADVANCE.

The facts appear with sufficient clearness and definiteness in the annexed affidavit of Irving W. Cole, for this motion, and in the record.

It is conceded that the only question in issue here is the jurisdiction of the court below.

General Rule 32 of this court reads as follows:

> "Cases brought to this court by writ of error or appeal, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals."

Defendant-in-error asks that this case be advanced as provided in the above rule.

Respectfully submitted,

IRVING W. COLE,
Counsel for Defendant-in-Error.

BRIEF FOR PLAINTIFF IN ERROR

SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. 438.

GREAT LAKES DREDGE AND DOCK COMPANY,
PLAINTIFF IN ERROR,

vs.

SOPHIA KIEREJEWICZ, AS ADMINISTRATRIX OF THE PERSONAL ESTATE OF LEO KIEREJEWICZ, DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

ULYSSES S. THOMAS,
Attorney for Plaintiff in Error,
700 Wilkin Building,
Buffalo, N. Y.

GEORGE CLINTON, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

GREAT LAKES DREDGE AND DOCK COMPANY,

Plaintiff in Error,

vs.

SOPHIA KIEREJEWSKI, as Administratrix of the personal estate of LEO KIEREJEWSKI,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes into this Court upon writ of error to review a judgment of the District Court of the United States for the Western District of New York entered in that Court on the 3rd day of June, 1922, in favor of the Defendant in Error and against the Plaintiff in Error, for the sum of $14,915.88, for damages, interest and costs in an action to recover for the death of Leo Kierejewski alleged to have been occasioned by the negligence of the plaintiff in error. The plaintiff in error was the defendant in the Court below and the defendant in error was the plaintiff in the Court below. For the sake of clearness and brevity the plaintiff in error will hereinafter be referred to as the defendant and the defendant in error as the plaintiff.

The reason for suing out a writ of error directed to the Supreme Court is that the sole question sought to be raised by the writ involves the jurisdiction of the District Court, it being contended by the defendant that in view of the provisions of the Workmen's Compensation Act of the State of New York, the United States District Court had no jurisdiction to entertain the cause. This question is also a constitutional question, being similar in character to that involved in State Industrial Commission of the State of New York against Nordenholt Corporation, decided May 29, 1922, not yet officially reported, 42 S. C. R., 473, hereinafter referred to as the Insana Case, in which this Court granted a Writ of Certiorari directed to the Supreme Court of the State of New York. Thus while there is but a single question involved in this Writ of Error, the question of jurisdiction of the District Court, it is properly before this

Court upon two of the grounds specified in the Statute
mitting direct writs of error to the District Court from
Supreme Court, namely, that the jurisdiction of the Cour
low is involved and the construction of the United States
stitution relating to admiralty jurisdiction is also invo
Either ground is sufficient to give this Court jurisdictio
the writ.

The Facts.

It appears from the Bill of Exceptions that the defen
Great Lakes Dredge and Dock Company was a corpora
engaged in the business of dredging, pile driving and sim
work at Buffalo, N. Y. That it maintained a yard at that
and owned a number of pile drivers, scows and tugs; tha
plaintiff's intestate, Leo Kierejewski, was in its general em
as a boiler maker and metal worker, not in the service of
particular vessel, but to do any work in the line of his t
that he might be called upon to do, either on land or on
defendant's scows, pile drivers or tugs. (Transcript of Re
pages 12-14-16-24-25-33.) At the time of the accident in
tion he had been in the employ of the defendant about
months or more.

On the 21st day of April, 1919, Kierejewski was engage
putting the finishing touches to certain repair work on a
belonging to the defendant, which was moored at a dock a
foot of Katharine Street in the Buffalo River at Buffalo, N
He was standing upon a scaffolding erected on a float a
side of the scow. This scaffolding was constructed in the
lowing manner. Near the end of the scow was moored a
driver belonging to the defendant; alongside of the scow
a float fastened to the scow by lines. On this float and sec
to it by spikes was a wooden horse and planks were laid
the horse to the deck of the pile-driver, the planks being sp
both to the pile-driver and to the horse. On these planks K
jewski stood while engaged in the performance of his w
While thus engaged the tug Edwards came up the river fo
purpose of taking the scow away to a point where it wa
quired in the defendant's dredging operations. The tug pa
by the float, turned in alongside the scow and backed dow
the vicinity of the float. When it had backed down far en
its engines were given a kick ahead to stop its sternway
the commotion in the water caused by the tug's prop
swamped the float, precipitating Kierejewski into the w
where he was drowned. The sole ground of negligence on
part of the defendant submitted to the jury was as to whe
proper and sufficient warning was given to Kierejewski. (T
script, pages 37-38-39-41.)

It was stipulated on the trial that the defendant had taken all necessary steps to comply with the Workmen's Compensation Act of the State of New York, so that if the accident is within the purview of that Act, plaintiff's remedy is exclusive thereunder. The particular provisions of the Act which the defendant claims are applicable are quoted in the argument on the law.

At the close of the plaintiff's case, the defendant moved for a non-suit upon the ground, among others, that the Court had no jurisdiction of the cause. This motion was renewed at the close of the entire evidence and the defendant at that time also moved for the direction of a verdict in favor of the defendant against the plaintiff upon the same ground. Each of these motions was denied and the ruling of the Court duly excepted to. (Transcript, pages 23-36.) In charging the jury the Court charged directly that the Court had jurisdiction of the subject of the action (Transcript, page 37); and to this charge the defendant excepted (Transcript, page 42).

The verdict having been received, the defendant moved for a new trial, which motion was entertained and denied, the opinion of the District Judge being found at page 46 of the transcript.

The Question Involved.

While the assignments of error are four in number, they all refer to different phases of the same question of jurisdiction and but one question is here involved, to-wit, that certified by the District Court in its certificate found at page 50 of the transcript. Stated briefly and in general terms the question is as follows: In case of a workman in the general employ of his master not attached to the service of a particular vessel, who is at the time engaged in making repairs upon a vessel while upon navigable waters, where the workman is killed by an accident due to the negligence of his employer under circumstances which would make the Workmen's Compensation Law of the State applicable if the cause were not one of maritime cognizance, does the Maritime Law apply to the cause of action or is it to be governed by the provisions of the State Compensation Act?

To state the question more succinctly, it is this, upon the facts above stated are the rights and remedies of the parties to this action governed by the Workmen's Compensation Act of the State of New York or by the general Maritime Law?

A fortiori, a contract for personal services generally, is non-maritime, though the character of the employer's business may require it to be performed in part upon vessels and in part upon land.

A decisive test of the non-maritime nature of the contract is found in the fact that the decedent could not have maintained a libel in admiralty, either against any of the vessels upon which he may have worked or against his employer *in personam*, for unpaid wages.

The contract of employment being non-maritime, it follows that the law governing the contract is the local law, and the liability in this cause being predicated upon the duty to warn of approaching danger which existed by reason of the relation of master and servant arising out of the contract of employment, the liability of the defendant is ultimately based upon the contract.

The case is indistinguishable in principle from the Rhode case above cited, and the only difference in the facts between the two cases upon which an argument can be based, is that in the Rhode case the injured employee's activities at the time of his injury were held to be non-maritime, while in the present case the decedent's activities were concededly maritime in their character. Analysis of the Rhode case, however, shows that the nature of Rhode's activities at the time of his injury had no bearing upon the conclusion reached by the Court in that case. The Court distinctly held by its answer to the first of the two questions certified that notwithstanding the non-maritime character of Rhode's employment and the non-maritime character of his activities at the time of the injury, the cause was one within the general maritime jurisdiction, and in the answer to the second certified question it was just as clearly held that the State Compensation Act "abrogated" the admiralty jurisdiction which would otherwise have existed. The reason for this is found in the opinion where it is stated, "Here the parties contracted with reference to the State statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential." The same reasoning applies with equal force to the present case. The parties having entered into a non-maritime contract of employment, contracted with reference to the local law; their rights and liabilities had no direct relation to navigation and it is as plain in the present case as in the Rhode case that no rule of the sea whose uniformity is essential could be materially affected by the application of the local law.

The case would be very different if liability were sought to
e enforced against a vessel or against her owners as such, for
t may with reason be said that it is essential to the proper con-
uct of commerce and navigation upon the sea that the rights
nd liabilities of vessels and their owners should not be sub-
ected to the conflicting local laws of the many different states
nd countries to which the exigencies of commerce may take
hem, but that is not the present case, for the rights and lia-
ilities concerned are those of master and servant, having a
xed location at the City of Buffalo in the State of New York,
nd the contract between them governing their mutual duties
nd obligations was entered into in view of the provisions of
he local law.

This is well illustrated by the fact that if it should be held
hat the Maritime Law is applicable to such cases as the present,
he employer would be unable to determine at any given moment
hat his duties and liabilities might be with respect to any
iven employee unless he should first ascertain what particular
ork the employee was engaged in at the time. Thus at one
oment the employee might be engaged in work in the defend-
nt's yard, thus being subject to the local law; half an hour
ter he might be making repairs on a vessel, and be subject to
he Maritime Law. In the first instance the employer would
e required to take out insurance under the Compensation Act
cover injuries to his employee. In the second instance such
surance would not furnish him the protection contemplated
the Act. In the first instance he would be liable for injuries
the employee irrespective of any question of negligence; in
e second, his liability would depend upon negligence, and he
uld never at any time know what his rights and liabilities
re with respect to his employees. The same holds true from
e view point of the employee, and thus we would have a con-
ion of uncertainty with respect to the law governing the re-
ions of the parties, which is manifestly contrary to the spirit
the decisions of this Court which seek to establish certainty
d uniformity in the law.

A decision in this case that the provisions of the Workmen's
mpensation Act govern the rights of the parties would be
sonant with the decisions of this Court in Southern Pacific
vs. Jensen, 244 U. S., 205; Chelentis vs. Luckenbach S. S.
247 U. S., 372; Union Fish Company vs. Erickson, 248
S., 308, and Knickerbocker Ice Co. vs. Stewart, 253 U. S.,
for in each of them the employment or contract was of a
ritime nature and the rights and liabilities of the parties
e governed by general rules of maritime law essential to its
per harmony and uniformity. Jensen was a stevedore, an

employment which, after some hesitation by the courts, ha
finally been held to be of a maritime character. Chelentis an
Stewart were seamen and Erickson a vessel master.

It follows from what we have said that the nature of th
contract of employment is the governing feature which co
trolled the decision in the Rhode case and controls the decisio
in this. The statement in the opinion in the Rhode case i
reference to Rhode's activities at the time of his injury ha
therefore, no bearing upon the questions there decided, for a
the Court said in its answer to the first of the certified que
tions, nothwithstanding the non-maritime nature of his acti
ities, the cause was one of general admiralty cognizance in vie
of the locality of the tort, and the reason for the application
the local law was the fact that the parties contracted wit
reference thereto. It is therefore the nature of the contrac
not the nature of the employee's activities, which determi
the law to be applied. In this connection we would call atte
tion to an article in the Harvard Law Review for April, 192
page 743, containing a discussion of the Rhode case. We quo
the writer's conclusion. "The proper criterion to be appli
under the statutes allowing contractual recovery seems to
the nature of the contract entered into by the parties. Th
contract on which recovery was allowed in the Rhode case w
non-maritime. There was no basis for the argument, therefo
that the statute imposed new and burdensome obligations on
maritime contract. It may happen that the workman, althou
employed under a maritime contract, is, at the time of t
injury, actually performing maritime labor, but since the natu
of the contract is decisive, it follows that this, as well as the fa
that his injury itself may be maritime, is immaterial."

This is an unprejudiced view of the scope and meaning of t
decision in the Rhode case.

POINT II.

There is no estoppel arising from the dismissal of the plaintiff's claim before the State Industrial Commission.

On the trial it appeared that before the commencement of the present action the plaintiff had filed a claim with the State Industrial Commission and had been granted compensation. Subsequently on the application of the defendant, the claim was dismissed on the authority of the Jensen and Stewart cases. The plaintiff now claims that this action by the plaintiff operates to estop the plaintiff from asserting that the District Court does not have jurisdiction. It is a sufficient answer to this to say that the question being one of jurisdiction of the subject matter, no action either of the parties nor of the Industrial Commission could confer any jurisdiction upon the District Court. Furthermore, the Industrial Commission did not decide that the District Court does have jurisdiction, for it was not competent to decide that question. All that it could and did decide was that it, the Industrial Commission, did not have jurisdiction and this Court is not required to follow that decision. The Insana Case (State Industrial Commission vs. Nordenholt Corporation, supra) is an illustration of the fact that this Court does not regard itself as bound to affirm the jurisdiction of the Federal courts in cases where the State courts have held that the Industrial Commission was without jurisdiction because the Maritime Law applied. That case and the present one are identical so far as this question is concerned.

Jurisdiction cannot be conferred upon the District Court any more by estoppel than by direct agreement of the parties.

In this connection we would point out that if this Court shall hold that the District Court has no jurisdiction by reason of the Compensation Act, the matter can be reopened by the Industrial Commission and the award already granted reinstated. Section 74 of the Act provides, "The power and jurisdiction of the Commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just." Under this section the Commission has held that where it has erroneously rescinded an award, it has jurisdiction to revoke its order and reinstate its award. (Opinion of State Industrial Commission, 19 State Dep. Rep., 492.)

POINT III.

The decision of the District Court should be reversed and the complaint ordered dismissed with costs.

GEORGE CLINTON, JR.,
Counsel for ~~Defendant~~ Plaintiff in Error.
1012 Prudential Building,
Buffalo, N. Y.

Office Supreme Court, U.
FILED
DEC 20 1922
WM. R. STANSBU
CLER

Supreme Court of the United States

OCTOBER TERM, 1922.
NO. 633.

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-in-Error,
vs.
SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of LEO KIEREJEWSKI, Deceased,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

IRVING W. COLE,
Attorney of record and counsel for Sophia Kierejewski, as Administratrix, etc., plaintiff in the court below, and Defendant-in-Error in this Court,
Office and P. O. Address,
1005 D. S. Morgan Bldg.,
Buffalo, N. Y.

ULYSSES S. THOMAS,
Attorney of record for Plaintiff-in-Error,
Office and P. O. Address,
719 White Bldg.,
Buffalo, N. Y.

GEORGE CLINTON, Jr.
Counsel for said Plaintiff-in-Error,
Office and P. O. Address,
1012 Prudential Bldg.,
Buffalo, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Page

Jurisdiction of Lower Court only Question at Issue. 1

Authorities Cited.

Sec. 238 Judicial Code 1

Wilson v. Republic Iron & Steel Co., 42 S. C. 35 1

Action under New York Death Statute (Sections 130-134 Decedent Estate Law, Chap. 13 N. Y. Consol. Laws) 1, 2

Plaintiff-in-Error Claims New York Workmen's Compensation Law (Chap. 67 N. Y. Consol. Laws) applies 2, 3

Contrary Claims of Defendant -in-Error 3, 4

Facts 5, 11

POINT I. The Case is of Such a Maritime Nature as to Exclude the Local Statute 1, 40

Authorities Cited.

Atlantic Transportation Co. v. Imbrovek, 234 U. S. 52 . . . . . 15, 24

Braisted v. Denton, 115 Fed., 428 13

Carlisle Packing Co. v. Sandanger, 42 S. C. 475 15

Charles Barnes Co. v. One Dredge Boat, 169 Fed. 895 13

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372 . . . . . 15, 24

Dailey v. City of New York, 128 Fed. 796 . . . 13

Ender v. Greco, 3 Fed. 411 13

Ex Parte Easton, 95 U. S. 68 13

Evans v. N. Y. & P. Steamship Co. 145 Fed. 841 14

Page

Grant-Smith Porter Ship Co. v. Rhode, 42 S. C. 157 ..... 15, 18, 19, 28, 33
Hoof v. Pac. Am. Fisheries Co., 279 Fed. 267 ..... 15, 28
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 ..... 15, 19
Matter of Reinhardt v. Newport F. S. Corp. 232 N. Y. 115 (and cases there cited) 12
McNamara v. McHarg B. Co. 200 A. D. (N. Y.), 188 32
Netherlands American Steam Nav. Co. v. Gallagher, 282 Fed. 171 ..... 15, 19, 21, 28, 30, 37
New England Mar. Ins. Co. v. Dunham, 11 Wall. 1, 26 36
New Jersey Steamship Co. v. Merchants Bank, 6 How. (U. S.) 344 36
Panama R. Co. v. Minnix, 282 Fed 47, 51 14
Reed v. Wuele, 176 Fed. 660 37
Reidel v. Mallory Steamship Co. 196 A. D., (N. Y.) 794 38
Sections 11, 20, Workmen's Compensation Law 40
Southern Pacific v. Jensen, 244 U. S. 205 ..... 15, 19, 22, 34
State Industrial Commission v. Nordenholt Corp. 42 S. C. 473 ..... 15, 27, 28, 29
The J. E. Rumbell, 148 U. S. 1 37
The Sirius, 65 Fed. 226 37
The Monongahela Nav. Co. v. The Steam Tug "Bob Connell", 1 Fed. 218 13
The Kongosan Maru, 282 Fed. 666 14
The Jerusalem, 13 Fed. Cas. No. 7294 36
The Convevor, 147 Fed. 586 36

Page

Union Fish Co. v. Brickson, 248 U. S. 308 40
Western Fuel Co. v. Garcia, 42 S. C. 89 ...15, 20
White v. Cowper, 272 Fed. 423 24
Maritime Nature of Tort and Service 11
Maritime Nature of Questions of Liability .. 13
Jurisdiction 14
"*Employment Was a Maritime Contract.*" 22, 24
Rhode Case Explained 24, 34
General Employment and Contract Maritime 34, 38
Legal Relations of Master and Servant Cannot Defeat Application of Maritime Law 39, 40
POINT II. Jurisdiction of Lower Court Not Put in Issue 40, 45

Authorities Cited.

Carlisle Packing Co. v. Sandanger, 42 S. C. 475 41
Grant-Smith Porter Ship Co. v. Rhode, 42 S. C. 157 41
Hoof v. Pac. Amer. Fisheries Co. 279 Fed. 267 41
State Industrial Commission v. Nordenholt Corp. 42 S. C. 473 45
POINT III. Plaintiff-in-Error Barred and Estopped by Judgment of State Industrial Board 45, 61

Authorities Cited.

Burgers v. Seligman, 107 U. S. 20, 33 58
Chicago Pneumatic Tool Co. v. Arnold, 282 Fed. 43 58
Clemens v. Clemens, 180 A. D. (N. Y.) 89 54
Conley v. Upson Co. 197 A. D. (N. Y.) 815 ... 54
Davis v. Wakelee, 156 U. S. 680, 689, 690 49

Page

Lee v. Cent. Georgia Ry. Co. 252 U. S. 109... 58
Matter of McGuire, 202 A. D. (N. Y) 1 53
Matter of Southern Boulevard R. R. Co., 143 N. Y. 253 54
Netherlands American Steam Nav. Co. v. Gallagher, 282 Fed. 171 59
Pendergast v. Berrian, 184 A. D. (N. Y.) 240 53
People Ex. Rel. Crane v. Hahlo, 228 N. Y. 309 54
Schienker v. Gargord Motor Truck Co. 183 A. D. (N. Y.) 166 55
Section 11 N. Y. Consol. Laws, Chap. 67 46
Section 20, N. Y. Consol. Laws, Chap. 67 47, 53, 56
Section 23, N. Y. Consol. Laws, Chap. 67 48, 53, 56
Section 226, page 1222, Vol. 21 Corpus Juris 49
Section 227, page 1123, Vol. 21 Corpus Juris 49
Sections 22 and 123, Chap. 67 N. Y. Consol. Laws 56
Shanahan v. Monarch Engineering Co., 219 N. Y. 469 46
Southern Ry. Co. v. Carson, 194 U. S. 136 58
Vine v. West End Presbyterian Church, 190 A. D. (N. Y.) 886 55

POINT IV. Damages Under Supreme Court Rules 23 and 38 Should Be Allowed Defendant-in-Error On Affirmance 61, 64

Authorities Cited.

Supreme Court Rules 23 (subdivision 2) and 38 ..... 61, 62
Deming v. Carlisle Packing Co. 226 U. S. 102. 64
Gibbs v. Dickens, 102 U. S. 410 64
Texas & Pac. R. R. Co. v. Prater, 229 U. S. 177 64

Supreme Court of the United States

OCTOBER TERM, 1922.
NO. 633.

GREAT LAKES DREDGE & DOCK COMPANY,
Plaintiff-in-Error,
vs.
SOPHIA KIEREJEWSKI, as Administratrix of the Personal Estate of LEO KIEREJEWSKI, Deceased,
Defendant-in-Error.

Brief for Defendant-In-Error.

As this case comes here direct from the District Court by writ of error (page 49 printed record), the sole question for review is the jurisdiction of that court. (Sec. 238 Judicial Code; Wilson v. Republic Iron & Steel Co., 42 Sup. Ct. 35).

The action is at law and was brought in the Supreme Court of the State of New York by defendant-in-error (plaintiff below), (page 23, id) under the New York death statute (Secs. 130-134 Dece-

dent Estate Law; Chap. 13 N. Y. Consolidated Laws) to recover damages for the death of her husband and intestate, an employee of plaintiff-in-error (defendant below), caused by a wrongful act, constituting a maritime tort, of the latter, while said employer and employee were performing maritime work and services in the course of the employment (pages 1-5 id).

The action was removed from the state to said Federal Court on application of plaintiff-in-error on the ground of diversity of citizenship, plaintiff-in-error being a New Jersey corporation and defendant-in-error a resident of the Western Federal District of New York where the cause arose (page 23, id).

It was tried twice before Hon. John R. Hazel, District Judge, and a jury, the last trial commencing April 20, 1922, resulting in a verdict for $14,833.33, including interest, upon which a judgment for $14,915.88, including costs and disbursements, was duly entered and docketed June 3, 1922, against plaintiff-in-error (pp. 42, 43, 44, 45, id).

The trial court held that the New York Workmen's Compensation Law (N. Y. Consolidated Laws, Chap. 67) was inapplicable.

Plaintiff-in-error here urges that the case is *not* of such a maritime nature as to exclude said local statute, and that it was, therefore, applicable, and

for that reason the court below had no jurisdiction of the subject matter of the action. The assignment of errors is founded solely on that (p. 47, id).

It is the position of defendant-in-error that:

(1). If said jurisdiction depends upon the applicability of said local statute, then, the case being of such maritime nature as to exclude its application, said jurisdiction is unaffected.

(2). Said question of applicability is not a question of jurisdiction, and, therefore, the jurisdiction of the lower court is not put in issue.

(3). Inasmuch as the New York State Industrial Board, the state tribunal having exclusive local jurisdiction of the matter, denied, before this action was begun, at the request of plaintiff-in-error, an application of defendant-in-error for an award of compensation under said local Workmen's Compensation Law, and the judgment so denying, having been duly entered, made binding on the parties, not appealed from or disturbed, and being still in force;

(a). Plaintiff-in-error, having thus procured such adjudication based on its claim and representation that the case *is* of such maritime nature as to exclude said local statute, is estopped from now making a claim exactly to the contrary—that is, that the case *is not* of such a maritime nature

as to so exclude—as a ground for attacking the jurisdiction of the lower court.

(b). If such adjudication was not on the ground above named, then the jurisdiction of the lower court, is, of course, complete, beyond question, and in fact, is not questioned.

(c). Said judgment is, or should be adopted as, *res adjudicata*, or the law of the case.

The facts have been established beyond dispute here and will be referred to under the following points.

POINT I.

The case is clearly of such a maritime nature as to exclude said local act because:

(1). This is an action *ex delicto* to recover damages for the death of defendant-in-error's intestate, an employee of plaintiff-in-error, caused by a maritime tort of the latter committed on navigable waters in the performance of its maritime functions and services, relating to navigation and maritime commerce—instantly the navigation on said waters of two maritime vessels, one of which it was then repairing,— while said employee was engaged, in the due course of the employment, on board said latter vessel, in said repair work.

(2). If any questions of the maritime nature of the general employment of intestate, or of the

relations of the parties as employer and employee, outside of, and separate and distinct from said work both were engaged in at the time of the tort, are at all material, then it is the contention of defendant-in-error that such general employment and relations were maritime.

I.

First, we urge that the facts involved in the above paragraph (1) are, alone, sufficient to exclude such local statute. *These facts are not in dispute.*

It is conclusively established by the evidence and verdict of the jury, that when said intestate was killed plaintiff-in-error, his employer, was engaged in its general business of dredging in navigable waters—in the Buffalo river and harbor on Lake Erie. In carrying on this business it owned, used, and navigated on said waters various maritime vessels, consisting of steam tugs, steel mud scows, floating derricks and dredges (pp. 12-22, 24-26, 29, 30, 33, 34 printed record).

Navigation of maritime vessels on navigable waters, and repairing them for that purpose, in the business of dredging in said waters is just as much maritime navigation and commerce as any. It is only because this seems to be questioned here that we regard the above statement of it as required or justified.

Intestate was in the regular employ of plaintiff-in-error. He was a master iron worker, technically called a boiler maker. It was his permanent and general employment to keep these maritime vessels in repair, doing this work while aboard them when they were lying on navigable waters (p. 16 id). He worked in a gang of about fifteen men of like character of employment under Stoyle, a foreman of plaintiff-in-error. Neither said employer nor employee engaged in any work on land, except such as pertained and was wholly, incidental to navigation and repair of these vessels in this work, and in the work, itself, of dredging. The employer had, as usual, a plant on land, with a wharf, used in and for this work, but wholly incidental, contributory, and relating generally thereto (see pages 33, 16, 24, 25, and pages 12 to 36 printed record).

At the time intestate was killed he was engaged in repairing one of these vessels while located thereon when it was lying on navigable waters, viz: the Buffalo river (pp. 16, 12, 13 id). He had been so engaged together with said gang of like workmen under said foreman, for about three weeks previous to the accident (pp. 16, 12, 13 id). This vessel was at moorage for the purpose of such repairs (pp. 12, 13, 14, 16, 17, 21, 24, 25, 26, 27, 33, 35 id). It was a steel mud scow—a maritime vessel. (The Sumbe[illegible]a, 195 Fed. 468; George Leary Const. Co. v. Matson, 272 Fed. 461). It

had been in use and was being repaired for the purpose of being further used, by plaintiff-in-error (pp. 33, 12 id). Indeed the accident occurred while the latter was engaged in the act of returning said vessel to such use.

These repairs were being completed at the moment of the accident. Intestate was engaged in the last work of such completion. In so doing he was standing on a scaffold placed on the outside of the outside corner of the down river end of said vessel painting some iron work which he and others of his co-workers had put on the vessel at said point in the making of such repairs. The scaffold he stood on consisted of two long planks one end of which rested upon and was fastened to a horse which in turn rested upon and was fastened to a float on the water, the other end resting upon and being fastened to a piledriver scow lying at the same moorage six or seven feet down river from the mud scow (pp. 12-18). The scaffold and float had been used in the same way at this and other points on the outer side and the ends of the vessel during the three weeks these repairs had been going on (pp. 13, 16 id).

The accident happened on April 21st, 1919, between three thirty and four o'clock in the afternoon (pp. 12, 14 id). It appears that Murphy, the superintendent of plaintiff-in-error, in general charge of the business, had at noontime that day told Stoyle, his subordinate, who was working on

said vessel as foreman of intestate and the other repair men there employed, that he, Murphy, was coming after said scow that afternoon with one of plaintiff-in-error's steam tugs to tow it away and put it in use at a point a mile down the river where dredging by the employer was going on. No notice or warning of this was given intestate. He had no knowledge of it (p. 34 id). The scow was lying on the left or port side of the river, going up. The pile driver scow to which one of the ends of said planks was attached, had a house on it of some height, and extended several feet farther out into the river than did the mud scow, and, lying down river therefrom, shut off somewhat, the down river view from the place where intestate was at work (pp. 15 id).

At the hour of the accident, the tug came up at about mid-river and passed by the piledriver scow, and by intestate so at work on said mud scow a distance of approximately 75 feet, to a point opposite the upper half of the latter vessel which was 145 feet long, the tug being 70 or 75 feet in length (p. 26 id). This was nothing unusual as vessels were passing up and down out on the river constantly (pp. 16, 20 id). Nor was there anything about this to give notice or warning to intestate of the purpose of the tug. He stood there on the scaffold painting with his back to the river and passing tug. Nor did this passing of the tug unduly or unusually disturb the water around or near the float supporting the

scaffold on which intestate stood (pp. 16, 20 id). But after the tug had so passed up river, it stopped and quietly backed obliquely in towards the scow and directly to the point where said float and scaffold were located, without any warning or notice to intestate either from Murphy, the superintendent, or La Croix, the captain of the tug, both of whom were aboard the latter, or Stoyle, intestate's foreman, who stood on the deck of the mud scow watching and directing intestate at his work; or from anybody or in any way. The tug thus in a most grossly careless and negligent manner backed quietly in and then, reversing the propeller, suddenly kicked ahead when its stern was within 4 feet of the float and scaffold (p. 28 id), thereby so agitating the waters as to disturb and submerge the float thus causing the scaffold to collapse and throw intestate into the river where he was drowned. He was taken out dead half an hour later.

All the notice intestate had as to this danger was at the very moment of such agitation of the waters and collapse of the scaffold when Stoyle, his foreman, spoke him to look out or he would get wet (pp. 12-36 id).

Whatever questions of fact may have existed as to notice or warning were resolved and settled by the verdict according to the above statement of the facts.

It was not claimed that any notice or warning other than that above stated was given to intestate directly. Murphy and Stoyle testified that as the tug was passing up, the former told the latter to get the men off as he was after the mud scow (p. 26 id). There is no proof that intestate heard this, and the fact that it took place at all was disputed by two other witnesses who were present, both employees of plaintiff-in-error (pp. 13, 17, 19 id).

It was admitted both by Stoyle and by Murphy, the latter of whom from the tug was all the time looking at intestate standing on the scaffold while the tug was so backing, that intestate did not, after Stoyle thus spoke to him, have time to get off or out of danger although he tried hard to do so, and was as a consequence, thrown into the water and drowned (pp. 28, 29, 31 id).

It is undisputed that the tug had a low pressure engine which ran very quietly. That it was unnecessary to back up to or near the point where this float and scaffold were. That while the purpose was to attach to the scow, that could have been done at other points along the scow at safe distances from the float. The tug was less than half the length of the scow (pp. 27, 28, 29, 30 id). Indeed, Murphy testified that the purpose was to attach the tug to the scow, put scowmen aboard the latter, and then detach the float and tow the scow away, and that he had scowmen on board the

tug for that purpose (pp. 26, 27, 28). Such scowmen could, admittedly, have been put aboard the scow at other places. The tug could have been made fast anywhere within a space of 110 feet along the side of the scow so the nearest point of the tug would have been more than thirty feet from where the float was, and intestate then warned, and then, after he had gotten off said scaffold, the float could have been detached from the scow and the latter towed away without danger to intestate or anybody. No explanation was given why this was not done (pp. 27-34 id).

Admittedly neither Stoyle nor intestate had any notice or knowledge that the tug was intending to be made fast to the scow at the point, of the float and scaffold, or was to approach so near that point, yet that was the avowed purpose of the tug, and it was doing that very thing while intestate stood on the scaffold engrossed in his work with his back to the river and tug, in plain sight of, and actually seen by Murphy from, the latter (pp. 25-34, id).

LAW.

Maritime nature of the tort and service.

That the work the master was engaged at—repairing this mud scow and at the same time trying to detach and tow it away with the tug—and the service the employee was performing—such

work of repairing—*at the time of the accident*, were maritime in their nature is clear enough and not disputed.

The employer was the owner of both vessels.

Judge Cardoza of our State Court of Appeals, said on Federal authorities in the Reinhardt case (232 N. Y. 115) at pages 117 and 118, that:

> "The fact is that it (term 'vessel' in maritime law) has been interpreted liberally and broadly. It includes a canal boat drawn by horses (The Robert W. Parsons, 191 U. S. 17, 30); a bath house upon floats (The Public Bath No. 13, 61 Fed. Rep. 692); a raft (The Mary 123 Fed. Rep. 609); *a scow* (The Sunbeam, 195 Fed. Rep. 468; George Leary Const. Co. v. Matson, 272 Fed. Rep. 461); a dredge (Chas. Barnes Co. v. One Dredge Boat 169 Fed. 895; Saylor v. Taylor, 77 Fed. Rep. 476; Ellis v. U. S. 206 U. S., 246, 259); a temporarily sunken drill boat (Eastern S. S. Corp. v. Great Lakes D. & D. Co. 256 Fed. Rep. 497); anything upon the water where movement is predominant rather than fixity or permanence (Cope v. Vallette Dry Dock Co. 119 U. S. 625; Berton v. Tietjen & Long Dry Dock Co., 219 Fed. Rep. 763, 774; The Mac, 7 P. D. 126; The Mudlark, 1911 P. 116; The Whitten, 1896 P. 42, 57, affd. 1897 A. C. 337)."

About the maritime nature of the work of navigating the tug that caused the accident, and of moving the scow, there can be no question.

Of course, the use and navigation of these vessels as appears here was maritime commerce.

It has long been established that repairing a scow is a maritime service (Ender v. Greco, 3 Fed. 411; The Monongahela Navigation Co. v. The Seam Tug "Bob Connell" and others, 1 Fed. 218; Ex Parte Easton, 95 U. S. 68; Braisted v. Denton, 115 Fed. 428; Dailey v. City of New York, *et al.*, 128 Fed. 796; Charles Barnes Co. v. One Dredge Boat *et al.*, 169 Fed. 895).

This work both employer and employee were engaged in doing at the time was part of the regular work of the master and of the employment.

The tort was therefore maritime not only in the locus, but, also, in the nature of the work being performed at the time. This, of course, would have given, had the case been there brought, jurisdiction to the admiralty, and, we contend, also excludes the local statute involved.

Questions as to liability.

While these questions are not here for review, we may be permitted to say briefly, in order to show their maritime nature, that it was the duty of plaintiff-in-error to furnish intestate with a reasonably safe place to work in repairing this vessel, and to use reasonable care to keep such place safe, and to warn intestate of this unexpected, *outside* danger to it, *a danger not at all incident* to this work of repairing. This duty plaintiff-in-error could not delegate, and the gross

negligence of the tug, and of Murphy, the superintendent, and also of Stoyle, the foreman, in thus causing intestate's death by thus carelessly making intestate's place of work dangerous by the reckless navigation of the tug, without adequate notice or warning, was the negligence of the employer (Panama R. Co. v. Minnix, 282 Fed. 47, 51; The Kongosan Maru, 282 Fed. 666), without any negligence whatsoever on the part of intestate.

The location and nature of the work and the tort required that all these duties, rights, and liabilities must be tested and determined by the characteristic features, rules, and principles of the maritime law.

Notwithstanding the mistake of the trial court in charging the jury, in accordance with the views and claims of counsel for plaintiff-in-error and against the objections of counsel for defendant-in-error, that the local common law rule of complete defense, and not the maritime rule of divided damages, must be applied, if any contributory negligence on the part of intestate should be found, the jury found there was *no* contributory negligence (p. 42 id).

Jurisdiction.

On the proposition that these facts alone, without reference to or consideration of the nature of any general employment involved, exclude the

local statute in question and remove that objection to the jurisdiction of the lower court we cite the following cases.

Southern Pacific v. Jensen, 244 U. S., 205, 37 Sup. Ct. Rep. 524.

Knickerbocker Ice Co. v. Stewart, 253 U. S., 149, 40 Sup. Ct. Rep. 438.

Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 38 Sup. Ct. Rep. 501.

Atlantic Transport Co. v. Imbrovek, 234 U. S., 52, 34 Sup. Ct. Rep., 733.

Western Fuel Co. v. Garcia, 42 Sup. Ct. Rep. 89.

Grant-Smith Porter Ship Co. v. Rhode, 42 Sup. Ct. Rep. 157.

State Industrial Commission of N. Y. v. Nordenholt Corp. 42 Sup. Ct. Rep. 473.

Carlisle Packing Co. v. Sandanger, 42 Sup. Ct. Rep. 475.

Hoof v. Pacific American Fisheries Co. 279 Fed. 267.

Netherlands Am. Steam. Nav. Co. v. Gallagher, 282 Fed. 171.

Of course, these cases are all very familiar to this court. They clearly, as we view it, establish the rule of exclusion of local Workmen's Compensation Acts as to liabilities between employer and employee in the above state of facts. Incidentally, but very plainly they follow the principle and establish that as a rule such exclusion, in an action *ex delicto*, for a wrong which constitutes

a maritime tort of the employer, resulting in injury or death of the employee, depends upon whether the employee at the time of such tort was performing a maritime service in the course of his employment—a service relating to navigation or maritime commerce; and that it follows, if the employee were so engaged, the employer was likewise so engaged; and that then, as has been often said, "the employment was a maritime contract."

In such case, of course, admiralty has jurisdiction because the tort occurred on navigable waters. And, also, as both master and servant were engaged in maritime work in the course of the employment, their relations and the employment were maritime, and, therefore, the liability of the employer must be determined by the maritime law, and, therefore, the applicability of any local Workmen's Compensation Act to determine such liability must be excluded.

The uncertainty of foreknowledge as to just what an employee may be doing or the place where he may be, when injured, referred to by counsel, is natural; and the dependent uncertainty as to what law will be applicable is likewise natural, and is controlled by the constitution and laws as they are.

These facts being established in the instant case, no consideration of the question as to wheth-

er the employment was maritime or non-maritime in its *general* scope and nature, outside the employment at the time the tort and resulting death occurred, is required. It makes no difference what the technical trade or general employment of intestate was, other than repairing this vessel, or where elsewhere he had been or might afterwards be employed, or what work he or his employer had done or might afterwards do on land or elsewhere, for the tort occurred on navigable waters, and it cannot be said that this work of repairing did not directly relate to navigation and maritime commerce; that it was not maritime services and work both master and servant were at the time engaged in; or that the servant was not so engaged in the due course of his employment and under the direction of, and such protection as the maritime law imposed on the employer as such; *or that such employment was not a maritime contract.*

* * * * * * * *

Some confusion in interpreting some of these decisions seems to have arisen from failure to appreciate their import in establishing this general rule that *the nature and character of the services the parties were performing at the time*, and not the fact of the maritime location of the tort, or the fact of the potential jurisdiction by the admiralty, is determinative on the question of excluding local statutes pertaining to liabilities then arising between master and servant. Of course, such mari-

time location of the tort, and such jurisdiction by the admiralty are essential, but not, in and of themselves always enough.

Not every tort occurring on navigable waters resulting in personal injury or death involves the performance of essentially maritime duties or service by the person injured or killed, or by the one who commits the tort—that is, their activities at the time may have no relation to navigation or maritime commerce. Not every injury to an employee by the tort of his master, even although occurring on navigable waters, involves duties or activities of the employee of this maritime nature in the course of the employment. The admiralty may have jurisdiction of such torts, but the further question is involved in the instant case, and in all such cases between employer and employee as relating to the question of the applicability of local compensation acts to liabilities between them, viz: was the employee at the time of the occurrence of the tort and the injury engaged in the duties of his employment and did such duties relate to navigation and maritime commerce? If so then both parties were engaged in maritime work under a maritime employment and contract and the maritime law must be exclusively applied. If the parties were not so engaged, then, according to decisions of which that in the Rhode case (42 S. C. 157) is the leading, maritime principles and rules of law do not, necessarily, or, therefore, exclusively, apply to the liability of the employer.

In that case the contract of employment was said to have specially contemplated the Oregon compensation act. And this act was not compulsory, as is the New York act, its application depending on the consent of the parties, resting in their silence on the subject.

These matters were referred to by this court, but the controlling reason for the decision, we think, was the non-maritime nature of the work both parties were doing just when the tort and injury occurred. Anyway the element which puts the instant case beyond all doubt is the fact that both parties were, at the time of the tort and accident performing a maritime service.

Such, we think, is the result of the decisions in the Jensen case (244 U. S., 205), Stewart case (253 U. S. 149), Rhode case (42 Sup. Ct. Rep. 157), Insana case (42 Sup. Ct. Rep. 473), and the recently reported Gallagher case in the Second Circuit of Appeals (282 Fed., 171).

In the last mentioned case is a very full and learned opinion in which many phases of the subject are discussed and numerous cases referred to and reviewed. It was announced before the decision of this court in the Insana case was handed down, but holds, with that case, that a stevedore working under a maritime contract, but *on the wharf* at the time of his injury, was not, by reason of the latter fact, injured as the result of a marine

tort, for the admiralty had no jurisdiction, and, therefore, the local compensation act is not excluded.

It follows the Jensen, Stewart, and Chelentis cases in the holding that the employment of a stevedore in loading or unloading a ship is "a maritime contract."

This opinion, as it is reported, very plainly, we think, misconstrues the decision of this court in the Garcia case (42 Sup. Ct. 89). In that case the deceased employe met his death as the result of a tort of his master committed on navigable waters. Application was made by the widow for an award under the California Workmen's Compensation Act and was granted but was afterwards annulled by the Supreme Court of that state on the ground that the case was of such maritime nature as to exclude said local act, and, as a result of that ruling, an action at law was commenced on the ground of negligence of the employer causing decedent's death. These features are identical with those in the instant case.

The question of the jurisdiction of the lower court based upon a claim that the case was not a maritime case was not, as it is in the instant case, sought to be presented. The parties and the courts also, after said decision of the state court, treated the case as of such maritime nature as to exclude the local compensation act. This may

have been for the reason that this point had been settled by the annulment of the award by the state court on that ground, or by the acts of the employer in procuring such annulment on that ground—estoppel—or it may have been conceded, independently of these things. Anyway, the California Workmen's Compensation Act *was not held applicable* as stated in the opinion in the Gallagher case on page 182 (282 Fed.), although it was held by this court that the limitation in the California *death statute* of one year must be applied and that that was a bar.

Judge Rogers, in the opinion above referred to, said:

> "But in Western Fuel Co. v. Garcia, *supra*, which we have seen was decided by the Supreme Court of the United States in December, 1921, the person was rendering service at the time he was killed under a maritime contract as he was employed as a stevedore, and the accident happened in the hold of the vessel so that the tort was also maritime, but, *nevertheless the California Workmen's Act was held applicable as we have already pointed out.*"

This is a very plain error—perhaps typographical. If that were true, then it would seem that any local Workmen's Compensation Act may be applied to a case even although the tort, the employment, the service, and the locus are all maritime. Indeed, just the contrary was held in the Garcia case.

We assume that the Second Circuit Court of Appeals did not intend so to hold because such a holding is entirely out of accord with all the decisions and the general tenor of the opinion itself.

* * * * * * * * *

This court said in the Jensen case:

> "The work of a stevedore in which the deceased was engaged is maritime in its nature. *His employment was a maritime contract and the injuries which he received in connection therewith were matters clearly within the admiralty jurisdiction.*"

Substituting the words "vessel repairer," equally a maritime service, for the word "stevedore" in the above quotation we have the instant case precisely. And whatever may be said of the general employment here to repair *many* vessels the answer is that the employee was at the time he was injured repairing *one particular vessel.*

And we might add to the language above quoted, according to the holding in that case:

> "And are such as to exclude any local statute as to liabilities arising from them."

Jensen's general duties of employment were to truck freight and cargo for the employer which operated a railroad and a steamship, and he was engaged, at the time he was injured, with a truck, unloading said ship. No features of the general work of either party, or of the employment, or

contract of employment, or their general nature as to being maritime or non-maritime, distinct and separated from what the parties were doing at the time of the tort, were referred to or considered. *Only just what the employment was and the parties were doing at the precise time of the tort, the nature of these, and the location, were considered.*

The court in using the language above quoted: "*his employment was a maritime contract,*" was evidently referring to such contract as narrowed and limited to the contract necessarily existing, either expressly or by implication, between the master and servant to do the particular work they were doing at the precise time of the tort.

It is significant that the above language of the Jensen case was restated by Justice McReynolds in the Insana case for the purpose, as he expressly stated, "*to show beyond any doubt that the maritime rules apply as to Jensen's injuries,*" *therefore, necessarily, to Kierejewski's injuries in the case at bar.*

In the Stewart case the employee was engaged, generally, with his employer in the ice business, not necessarily maritime. But at the time of the tort he was acting as a bargeman, a maritime service.

Likewise was the contract of employment referred to and held to this limited and specific

sense in the Chelentis case (247 U. S. 372, 382) when this court used the following language:

> "The work about which the petitioner was engaged is maritime in its nature; *his employment was a maritime contract;* the injuries received were likewise maritime, and the parties' rights and liabilities were clearly within admiralty jurisdiction."

Judge Hazel very correctly stated below in setting aside the first verdict in the case at bar:

> "The repair work on the scow to make her fit was a maritime activity relating to navigation and commerce. (Atlantic Transport Co. v. Imbrovek, 234 U. S., 52; White v. Cowper 272 Fed. 423)."

It must follow that said "*employment was a maritime contract*" as said in the Jensen and Chelentis cases.

The maritime nature of the service the parties are employed at, *if in the work of the employment*, makes, under these decisions, such "*employment a maritime contract.*"

* * * * * *

Some misunderstanding seems to have arisen as to the position of this court on some aspects of these questions from the decision in the Rhode case (42 Sup. Ct. Rep. 157). It seems to be the impression in some quarters that the decision limits or even modifies the decisions in the Jensen and Stewart and other earlier cases. That is a

mistake. The Rhode case merely holds our contention that the locus of the tort and consequent jurisdiction of the admiralty are not, alone, always determinative of this question of exclusion, especially in the face of a contract of employment expressly applying the local law, which law in that case, unlike that involved in the instant case, was not compulsory and could not apply against the objection of either party properly and timely expressed.

In that case neither the general work of the master, nor the contract or work of the employment, *nor the activities of either party at the time of the tort*, were maritime. The master was a shipbuilding corporation and was, as was also the servant, engaged, at the time of the tort, in that nonmaritime business. The vessel upon which the employee was at work was moored at the shipbuilding plant of the employer in navigable waters at the latter's wharf, but was incomplete, had never been in commission, and the parties were engaged in the work of completing it. Neither was, therefore, engaged at the time in a maritime service. This court said:

> "*The contract for constructing the Ahala was not maritime.* Although the incompleted structure upon which the accident occurred was lying in navigable waters, neither *Rhode's general employment nor his activities at the time* had any direct relation to navigation or commerce."

Reference to the fact that both employer and employee were engaged in the work, generally, of

performing a non-maritime contract was made, we take it, as simply bearing upon, but not decisive of, the vital and controlling question as to whether they were at the time of the tort performing a maritime service in the employment, and aiding to the conclusion reached on that question. As it was held that neither was at the time engaged in performing a maritime, but rather a non-maritime, service, and, therefore, the employment, the relations of master and servant, were not maritime, the local statute was held to be applicable for the reason that the maritime law was not applicable to determine liabilities between the employer and employee arising while they were so employed, in superiority to a contract between them to apply a local statute to determine such liabilities so arising from non-maritime service, wherever the tort occurred, (a contract, by the way, which is not in the instant case).

Suppose Rhode had been repairing, in the course of his employment, an old and used vessel lying on navigable waters. Can there be a doubt that, then, the local statute would have been excluded even although the general work and employment were shipbuilding? Certainly not unless the understanding in that case that the local law should apply was considered controlling, or unless the Jensen case was reversed.

As the tort occurred on navigable waters, it was held that admirality had jurisdiction pursuant to

the rule that the locus is the exclusive test of that, but that, because the work and employment *at the time of the tort* were non-maritime, the local statute was not excluded, thus pointing out the distinctions we are making here as to the non-effect of both the locus and the jurisdiction by the admiralty, and the determinative effect of the maritime nature of the employment and activities of the parties at the time, on this question of exclusion, when such location on navigable waters and jurisdiction exist.

If both parties had been engaged in a *maritime service in the employment* at the time of the injury on *navigable waters*, then the non-maritime nature of the general contract they were performing, or of the general contract of employment, or of their work at other times and places could not have defeated the application of the maritime law to the exclusion of the local statute. The "employment" at the time would then have constituted a "maritime contract." Nothing contrary to this was held in that case.

The agreement to apply the Oregon non-compulsory compensation act may have had some effect on the decision in that case. This court said:

> "Here the parties contracted with reference to the state statute"

But that element is not in the instant case.

In the Insana case (42 Sup. Ct. 473) it was held by this court that as the injury occurred on the

dock—on land within the decisions—admiralty had no jurisdiction; therefore, of course, the local statute could not be excluded. So it was held in the Gallagher case (282 Fed. 171).

But it was held also in those cases that the employee was performing a *maritime contract*. But this was of no avail because the tort took place on land, and, therefore, was not maritime for admiralty had no jurisdiction, and the law of the land, the local and not the maritime law, was applicable to the liability.

In the Hoof case (279 Fed. 367), the Court said, (p. 369):

> "In order to support jurisdiction in admiralty in the case of a tort resulting in personal injury, *it is not necessary that the injured person shall have had a maritime contract with the owner or with the vessel.*"
>
> * * * * * *

From these cases (Rhode, Insana, Hoof, and Gallagher) it seems clear that the maritime or non-maritime nature of any general contract involved cuts no figure except as bearing on the nature of the activities of the parties—the employment—at the precise time of the tort, in cases where the tort occurred on navigable waters and admiralty, therefore, has jurisdiction. If the parties were engaged at the time in maritime work in the employment, and the tort occurred on navigable waters, then the admiralty has jurisdiction, and "the employment was a maritime con-

tract", and it makes no difference whether they were performing, generally, a maritime or a non-maritime contract—the law of the seas, the maritime law, must then be applied, and the local statute excluded.

This court in the Insana case reversed decisions of the New York State courts holding that this question of exclusion is controlled by the nature of the general employment or contract, that is, whether maritime or non-maritime, saying:

> "The court below has made deductions from Southern Pacific Co. v. Jensen, Clyde Steamship Co. v. Walker, and the Knickerbocker Ice Co. v. Stewart which we think are unwarranted, and has proceeded upon an erroneous view of the Federal law,"

and quoted from the Jensen case the language above set forth to the effect that the stevedore's "*employment at the time was a maritime contract*", and followed it by the statement that:

> "The doctrine that locality is the exclusive test of admiralty jurisdiction in matters of tort had been questioned in the Imbrovek case and to show beyond any doubt that the maritime rules apply as to Jensen's injuries, we used the quoted language."

And further said:

> "When an employee working on board a vessel in navigable waters sustains personal injuries there and seeks damages from the employer, the applicable legal principles are very different from those which control if he had been injured on land while unloading the vessel. *In the former situation the liability*

of the employer must be determined under the maritime law, in the latter no general maritime rule prescribes the liability and the local law has always been applied.''

The State courts overlooked four points: (1) that in tort cases admiralty must have jurisdiction in order that the maritime law may be applied to the liability, either in a proceeding in admiralty, or in an action at law under the saving clause of the constitution; (2) that admiralty has no jurisdiction of torts occurring on land; (3) that the maritime law must be applicable in order that a local compensation statute must be excluded; (4) that in order to make the maritime law exclusively applicable to liabilities between master and servant arising from a tort of the former, the work and service, the relations of the employment at the moment, as well as the locus, must be maritime.

In the Gallagher case (282 Fed. 171) to which we have already referred, where the employee was engaged in a stevedoring employment but was working on the wharf when injured and was, therefore, although working under a maritime contract, not injured as the result of a maritime tort, admiralty, because of the locus, having no jurisdiction, thus permitting the local compensation act to be applied, the court said, among other things:

> ''Assuming that the plaintiff was employed as a stevedore his contract to render service

in loading or unloading a ship is to be regarded *as a maritime contract.*" (page 175).

And further (page 176):

"While the plaintiff's contract was plainly a maritime contract, if he was employed to render a stevedoring service and one consequently within the admiralty jurisdiction, if suit had been there brought upon it, the important fact here is that the present action is not brought upon the contract. And as this is not a suit *ex contractu*, it is of no consequence that the admiralty and maritime jurisdiction extends to maritime contracts unless it be for the reason herein mentioned. Inasmuch as the action is one *ex delicto*, we must inquire whether the tort complained of is a maritime tort. If it be such a tort it is within the admiralty jurisdiction; otherwise not, as will appear more fully as we proceed."

The reason above mentioned to be afterwards referred to was involved in the final holding that although the injured employee was performing a maritime contract he was injured on land and not as a result of a tort of which the admiralty could take cognizance, and, therefore, the local act applied.

The decisions of the New York Court of Appeals holding otherwise were referred to but disagreed with and later the holdings of those decisions were reversed by this court, as we have said, in the Insana case.

The court in the Gallagher case further said:

"The admiralty has jurisdiction of a suit

to recover damages for a maritime tort that occurs on navigable waters which afford a highway over which commerce may be carried on with other states or foreign countries * * * and the test by which it is determined whether the tort is a maritime one depends upon the locality of the person or thing injured at the time the injury is inflicted." (page 176).

The court further said (page 181):

"*Thus a contract to repair a ship is maritime although the work may be done on the land, as where the ship has been taken out of the water and put on the land.* * * *

From what has heretofore been said, we think it sufficiently appears that in actions which are *ex delicto* the question whether the tort is maritime or non-maritime does not depend upon whether or not the person who brings the action was, when he was injured, working under a maritime contract. It depends solely upon the locality of the person injured at the time the wrong was committed. If the wrong takes place on land it is non-maritime, and if it takes place on navigable waters it is maritime."

And further on page 177:

"As the tort is non-maritime and the action is not on the maritime contract the plaintiff's remedy would seem to be such as is giving to him under the laws of the State within which the cause of action arose."

One of our State courts in McNamara v. McHarg Barton Co. (209 N. Y. A. D. 188), well said:

"Although the general nature of the claimant's work may have had reference to the

> construction of the pier, he was *at the time of the accident repairing or readjusting this navigable craft.* This circumstance distinguishes the case from those where awards have been sustained for injuries arising out of the work in constructing or repairing docks or piers but without reference to any change or modification of a vessel although such vessel at the time may have been utilized in the work of such dock construction or repair."

In the Rhode case (42 Sup. Ct. Rep. 157) this court said:

> "The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality has been so frequently asserted by this court that it must now be treated as settled."

The court was here referring, in terms, only to the question of jurisdiction of the admiralty, but was treating, generally, this question of exclusion, assuming that application of maritime law follows such jurisdiction. That is true, but we are not resting here on that alone on this question of exclusion, but also invoke the maritime nature of the work, and relations of the parties as employer and employee at the time, and take it as settled that in cases where an employee is injured or killed by a maritime tort of the employer, service of such maritime nature is a necessary element of exclusion, and that then the employment and contract and relations of employment are to be considered maritime, and the location and nature of the tort and of such instant

employment and service are the sole tests of excluding local compensation acts, otherwise applicable; and that any non-maritime nature of any contract of general employment, or of the general work, as separate and distinct from the work they were engaged in at the time, is not material. This seems to be the import of the Rhode and Jensen cases read together. Then the "*employment (at the time) was a maritime contract*" (Jensen and Chelentis cases, *supra*).

II.

Second, (under paragraph (2) found at the commencement of this point), if the character of the general employment or contract of employment of intestate—that is, as to whether, generally, and as a whole, maritime or non-maritime—has any significance, then, disregarding the maritime nature of the work the parties were employed in doing at the precise time of the tort, and also the rule that such employment is then a maritime contract, we say such general employment and contract were also clearly maritime.

Defendant was engaged at the time in the general business of navigating these maritime vessels in navigable waters, and, of course, in keeping them in repair for that purpose, in order to carry on the work of dredging. That was its only business and the sole purpose of its corporate existence. At any rate it was engaged in no other busi

ness at the time, using the term "time" in its broadest sense. That certainly is navigation and maritime commerce. Whatever work defendant did, or had done for itself on land, or whatever plant or places for work it maintained on land, were all directly related, contributory, and incidental to this work of navigating these vessels and keeping them in repair for the purpose of its business of dredging.

Intestate was in the general employ of plaintiff-in-error to do the work of keeping these vessels in repair, mostly iron work, but, also, all work incidental thereto. He was painting in this repair work at the time of the accident. His place of work in so repairing, of course, was on the vessels themselves on navigable waters. That was instantly true. If he prepared on land parts, appurtenances, appliances, instruments, or material, or anything else to use or apply in such repair work, that does not destroy the maritime nature of his general employment or of his general contract of hire. He had been in this employ for a long time. Had been working repairing this particular vessel for three weeks. He was doing at the time of the accident just what he was employed to do, and exactly in the course of his general employment and of the general work of the master. The fact that the nomenclature of his trade is boiler maker has no significance. He was, as shown by the evidence, a master iron worker. He was not, primarily, employed to construct

boilers or anything else but to keep the vessels of his employer in repair, the doing of which was iron work—this scow was of steel construction—perhaps sometimes repairing, or even making, boilers or other things used on some of these vessels, although it appears nowhere that he made anything. But if he ever did that it was, necessarily, for, and in the nature of repair of, some one in particular of these vessels, and, therefore, a maritime work.

Besides it must be remembered that any question of fact in this behalf has been resolved in favor of defendant-in-error.

* * * * * * * * *

The test of the maritime nature of a contract is its subject matter and not the location of its making or performance.

The Jerusalem, 13 Fed. Cas. No. 7294.

If the undertaking is for maritime service or transactions it is a maritime contract.

The Conveyor, 147 Fed. 586.

New England Mar. Ins. Co. v. Dunham, 11 Wall. 1, 26.

N. J. Steamship Co. v. Merchants Bank, 6 How. (U. S.) 344.

Ex. p. Easton, 95 U. S. 68.

If it is essentially maritime although not wholly or exclusively so, that is enough to make it a maritime contract.

Evans v. N. Y. & P. Steamship Co. 145 Fed. 841.

A contract for repair of a vessel is maritime.

The J. E. Rumbell, 148 U. S. 1.
Reed v. Weule, 176 Fed. 660.

So must be an employment to so repair.

The Court in the Gallagher case (282 Fed. 171) said, page (175):

> "The question whether a contract is maritime or not depends in this country simply on the subject matter of the contract and not on the place where the contract is made. * * *
> If a contract relates to a ship or to commerce on navigable waters it is subject to the maritime law and is within the admiralty and maritime jurisdiction *whether contract is to be performed on land or water.*"

And further:

> "It is the subject matter of the contract and not the place where the act is performed, that determines whether a contract of service is maritime or not. *Thus a contract to repair a ship is maritime although all the work may be done on the land, as where the ship has been taken out of the water and put on the land.*"

In the Sirius, (65 Fed. 226), the Court, discussing the question of what is and what is not a maritime contract, said:

> "The subject matter of the contract—the substantial object and end—must pertain

> to navigation or be connected with transactions performed by vessels on the sea to become maritime in its nature and be clothed with the privilege of a remedy in admiralty courts and it appears to be that an agreement acquires this maritime quality * * * * when the matters performed or entered upon under it pertain to the fitment of a vessel for navigation, aid or relief supplied her in preparing for or conducting a voyage or the freighting or employing of her as an instrument of voyage * * * * without attempting to define with strictness term within which the jurisdiction of admiralty courts is circumscribed, it may be safely asserted that to impart a maritime character to a subject relating to personal services on vessels, it must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation, directly by labor on the vessel, or in sustenance and relief of those conducting her operations."

In the Riedel case (196 App. Div. 794) the Court well said on this subject, citing Federal cases:

> "In contract cases admiralty jurisdiction depends upon the nature and character of the contract 'whether it was a maritime contract having reference to a maritime service or maritime transactions,' and maritime services and transactions are such as are to be rendered or performed upon the high seas or navigable waters, *or directly connected with navigation on navigable waters.* (Atlantic Transport Co. v. Imbrovek, 234 U. S., 52, 60, 62, * * * * Ins. Co. v. Dunham, 11 Wall. 1; New Jersey Navigation Co. v. Merchants Bank, 6 How. (U. S.) 344)."

III.

Relations of master and servant cannot defeat application of Maritime Law.

Third: Any contention that the mere fact of the relation of master and servant existing between plaintiff-in-error and defendant-in-error's intestate has any bearing upon or can prevent the effect of this maritime nature of the case to exclude a local compensation act, can have no force. In all cases dealing with the questions here presented, the relations of master and servant existed; as in the Jensen, Stewart, Insana and Rhode cases. It could not be otherwise. In no other kind than master and servant cases, can these questions arise.

No legal relation of parties, whether that of master and servant or something else, can put aside the rules and principles of the maritime law when applicable. And if that be the object or the claimed effect of any such legal relation, they must, nevertheless, be subjected to the maritime law. No local law, or any law, other than a constitutional act of Congress, can invade or thrust aside the rules and principles of the maritime law when they are otherwise applicable.

Nor is there anything in the contract of employment here which, purports to, or could exclude the maritime law. It is a simple contract

of hire. Nothing even such as there was in the Rhode case, including and contractually applying the local law. A contract of employment such as we have, left as it is, to the applicable law either local, common, or maritime, *comprehends and contemplates the maritime law* (Union Fish Co. v. Brickson, 248 U. S. 308),—must do so, and, therefore, the latter must be applied to the exclusion of any other law.

We again refer to the language of Justice McReynolds in the Insana case:

> "When an employee working on board a vessel in navigable waters sustains personal injuries there and seeks damages from the employer * * * the liability of the employer must be determined under the maritime law."

The New York Workmen's Compensation Law is not contractual as between employer and employee, as was the Oregon law in the Rhode case, but compulsory and exclusive. (Secs. 11 and 20 N. Y. Workmen's Compensation Act.)

It is here the same local statute and the same situation dealt with in the Jensen and Stewart cases.

POINT II.

Jurisdiction not here put in issue.

This being an action at law, the potential jurisdiction or non-jurisdiction of the admiralty, or

even the maritime or non-maritime nature of the case, cannot, as we view it, affect the jurisdiction at all. No local statute can deprive a Federal court of jurisdiction. Diversity of citizenship conferred jurisdiction in this action on the District Court below, whether the case is maritime or non-maritime.

These considerations, however, do affect the question of *the applicability of the local statute in question to the liability and that is the question here*—a plea in bar

The familiar rule that the maritime law governs in all cases of marine tort whether in a proceeding in admiralty or in an action at law was repeated in Carlisle Packing Co. v. Sandanger (42 Sup. Ct. 475). A question of proper remedy or a question of what law is applicable to the liability sued on, is not, however, as here involved, a question of jurisdiction.

That admiralty may have jurisdiction because of a tort committed on maritime waters in cases of master and servant when a local compensation statute is not excluded, that is, in cases where the activities of neither party relate to navigation or maritime commerce, and the contract of employment expressly contemplates another law, was held, in the Rhode case (42 Sup. Ct. Rep. 157) and in Hoof v. Pac. Am. Fisheries Co. (279 Fed. 367).

Likewise such jurisdiction is extended to this action at law by the constitutional saving clause.

The jurisdiction of the admiralty in the instant case, had the case been brought in admiralty, cannot be questioned because, concededly there was a tort and it occurred on navigable waters. There is no constitutional question of admiralty or any other kind or jurisdiction involved as claimed by counsel for plaintiff-in-error. On this branch of the case it is simply a question whether it is of such a maritime nature as to constitutionally exclude the local statute in question. This does not go to the basis of jurisdiction of the cause—*the tort*. Neither can jurisdiction of the tort in this action, because it is a maritime tort, be questioned, for this action is a "saved" common law remedy if the case be maritime, and, if the case be or be not maritime, the jurisdiction is conferred by the diversity of citizenship.

* * * * * * * *

While such jurisdiction of the admiralty is thus beyond question here, it may be added that the rule often laid down in general and sweeping terms as thoroughly established, that the locus of a tort is the exclusive test of admiralty jurisdiction of it, has never been questioned by the courts. It was not questioned in the Imbrovek case (234 U. S. 52) *by the Court*, but on the contrary, this court in that case repeated the rule in terms above indicated, as follows:

> "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

This was questioned, however, by the plaintiff-in-error in that case by claiming that such jurisdiction depended not only on the locus but also on whether the tort was maritime in its nature aside from mere location—that is in the work or service being done at the time. It was asked if one passenger slanders another on board a vessel on navigable waters, whether that would be such a tort as admiralty takes cognizance of? Further pursuing that thought, it might be asked whether if one person assaults or negligently injures another while both are bathing in navigable waters, that would be sufficient? Or if, when the parties are engaged in non-maritime works and service on navigable waters, as in the Rhode case, that gives admiralty jurisdiction? The decision in the case just mentioned answers the last, if not all, the above inquiries in the affirmative.

The court held that the tort in the Imbrovek case was *one of a maritime nature in the work or service being performed* as well as in the locus, and decided the case on that theory, saying:

> "If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters *was quite sufficient.*" * * *
>
> To hold that a case of a tort committed on

board ship in navigable waters by one who has undertaken a maritime service, against one engaged in the performance of that service is not embraced within the constitutional ground and the jurisdictional act would be to establish a limitation wholly without warrant."

Assuming, without claiming, that such jurisdiction extends to all torts committed on navigable waters, regardless of the nature of the activities of the parties at the time, under the rule that the locus is the exclusive test of admiralty jurisdiction of torts (Rhode, Imbrovek, and Gallagher cases, *supra*) the instant case, like the Imbrovek case, does not, and need not, involve that question, for the maritime nature of the tort here—in addition to the locus—and the maritime nature of the activities of the parties at the time—their relation to navigation and maritime commerce—are not and cannot be questioned. But the conditions which were stated as supporting the admiralty jurisdiction in the Imbrovek case, and which exist and would have given such jurisdiction in the instant case, exclude the local statute, for the imperative application of the characteristic features rules, and principles of the maritime law to such a case necessarily excludes a local statute which would otherwise invade and destroy the uniformity of the maritime law by preventing the application of such rules and principles to determine maritime rights and remedies between mas-

ter and servant. Then, as this court said in the Insana case (42 Sup. Ct. 473):

> *"The liability of the employer must be determined under the maritime law."*

POINT III.

Plaintiff-in-error is (1) barred by the judgment of the New York State Industrial Board from claiming that this is not a Maritime case of such a nature as to exclude the local compensation Act in question, and (2) is estopped from so claiming now by its own Acts in that behalf.

The record shows that defendant-in-error, the widow, made claim for herself and two children to the New York Industrial Board for an award of compensation under the New York Workmen's Compensation Law (Consolidated Laws Chap. 67) which was allowed May 8th, 1919, in weekly installments which were paid for some time, and then on February 25th, 1921, this award was revoked and the claim dismissed by said Board *on the application of the plaintiff-in-error* and judgment to that effect was duly entered. (p. 22, 41 printed record.)

While the record does not expressly show the ground upon which defendant's application to the Industrial Board for dismissal of the award was made, it was talked in the discussions at the trial, and undisputed, that the sole ground was the de-

cision in the Jensen case which was handed down by this court after the award had first been made and just previous to the time said application for denial of the award was made.

We note that counsel for plaintiff-in-error concedes this here. If we must rest upon the record as it is here, then this court cannot say what the ground of the dismissal of the award was. But, in that case, the fact that it was dismissed by the Industrial Board and the award denied would surely be conclusive in the matter not only upon the parties but upon this court.

No appeal was taken by either party from this judgment. It stands binding on the parties here. As a result thereof, and as permitted thereby, this action at law was commenced to recover damages on the ground of negligence. The amount of the award paid, viz: $1045.60, was deducted by the jury, under proper instructions of the trial court, from the amount of damages as assessed (p. 41 id), and the verdict was for such amount as so reduced.

The New York Workmen's Compensation Law is compulsory and exclusive as to all the employments to which it applies (Sec. 11 New York Workmen's Compensation Act; Consolidated Laws Chap. 67; Shanahan v. Monarch Engineering Co., 219 N. Y. 469).

But this court said in the Jensen case it could not apply to maritime employments.

Said Industrial Board was created to adjudicate on all claims for award under said law. Authority to grant or deny any such award is given such Board by Section 20 of the Act as follows:

> "The Board shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The Commissioner or Board shall make or cause to be made such investigation as it deems necessary, and, upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section or such hearing closed, shall make or deny an award determining such claim for compensation and file same in the office of the Commission."

The Board made such determination denying any award to defendant-in-error under the Act on February 25, 1921. Both parties accepted that ruling. Concededly plaintiff-in-error made the application for this ruling to the Industrial Board on the ground that this is a maritime case of such a nature as to exclude such Workmen's Compensation Law, and succeeded.

The same section (20) further provides:

> "*The decision of the board shall be final as to all questions of fact*, and, except as provided in section twenty-three, *as to all questions of law*."

Section 23 above referred to, provides:

> "An award or decision of the board shall *be final and conclusive* upon all questions within its jurisdiction as against the state fund *or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided.* Within thirty days * * * * an appeal may be taken to the appellate division of the Supreme Court."

No such appeal was, nor can be now, taken. The decision was never reversed as in the Insana case where an appeal was taken and the direct case finally brought here.

Then when this action at law was commenced, the only remedy then left to the widow and her children, and the very one which these acts of the employer and this judgment of the local court pointed out to and, indeed, thrust upon her, said employer, to defeat it, sets up that the case *is not of such a maritime* nature as to exclude said local statute.

Admitting here, its negligent killing of deceased, it still contends for this plea for the same purpose.

(1.) Said employer ought not to be now heard in any such contention.

The general principles of estoppel applicable are familiar:

> "Where a party gives a reason for his

position and conduct touching another involved in a controversy, he is estopped after litigation has begun, from changing his ground and putting his conduct on another and different consideration." (Sec. 226, page 1222, Vol. 21, Corpus Juris.)

"A party who has with knowledge of the facts, assumed a particular position in a judicial proceeding and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." (Sec. 227, page 1223, Vol. 21 Corpus Juris.)

These rules have been often laid down by this court. We need cite only the case of Davis v. Wakelee (156 U. S., 680, 689, 690). In that case Davis gave Wakelee some promissory notes in California in 1869. A few days later Davis was adjudged a bankrupt in the U. S. District Court of California. These notes were proved against his estate. Afterwards Wakelee was given leave by said court to bring an action on said notes and procured judgment in such action for the amount of the notes and interest. After that Davis petitioned said court for a discharge in bankruptcy to which Wakelee objected. Davis moved to dismiss such objections on the ground that Wakelee, pursuant to leave of the court, had put the notes in judgment which was in full force, and the notes having been merged in the judgment, became a new debt and was not included in or discharged by the bankruptcy, and, for that reason, Wakelee had no standing or interest in said proceedings, and, therefore, could not object to Davis' discharge.

Davis was sustained in his contention and was discharged. Wakelee accepted the situation and did not appeal. Subsequently Wakelee's assignee of said judgment, while preparing to commence an action at law thereon in the courts of the State of New York, was informed that Davis intended to set up defenses thereto, one of which was that Davis had been discharged in bankruptcy in California and that the judgment upon which such assignee was to bring the action at law was included in such bankruptcy proceedings, and, therefore, any action thereon was barred by such discharge.

This claim of Davis was, of course, exactly contrary to the claim he urged before the California Bankruptcy Court at the time he was discharged to overcome objections thereto, for he then claimed that the judgment was not, and now claimed that it was included in the bankruptcy proceedings and for that reason could not be sued upon.

Wakelee's said assignee, on the theory that an action at law in the first instance did not furnish an adequate remedy, commenced an action in the Federal Courts in New York in equity to restrain Davis from setting up such defense.

The lower courts, and finally this court, sustained such action in equity and granted the relief asked therein, saying:

"It may be laid down as a general proposi-

> tion that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position especially if it be to the prejudice of the party who acquiesced in the position formerly taken by him."

The "position" referred to was as much or more as to the law as to the fact.

Plaintiff-in-error in the instant case, contended before the New York Industrial Board that this is a maritime case of such a nature as to exclude the New York Workmen's Compensation Law and that the State Industrial Board, for that reason, had no jurisdiction to grant an award. Thus went more to the fact than to the law. It succeeded in that and accepted the benefits of victory, while defendant-in-error accepted the consequences of that determination. It was against her contention put forth at the time and she was defeated, but did not appeal, taking, instead the only other remedy remaining to her—this action at law, based on negligence. Plaintiff-in-error, therefore, pleaded for and was granted the right to contest this action on the question of its own negligence. Defendant-in-error accepted the issue so offered. She stood to win or loose all on it. She did not, in street parlance, plead the baby act.

She has been put to great trouble and expense in commencing and fighting this action; has tried

it twice in the Federal District Court and is still here after a year and a half of such fighting to sustain a judgment in it in her favor.

Plaintiff-in-error has lost on the issue of its own choice. A powerful corporation and its great surety company are now, from a well-deserved defeat brought on themselves, pleading the baby against a poor widow and two real helpless babies in the flesh.

It seems to us that it would be unjust and contrary to the first principles of estoppel to permit this judgment now to be wiped out on any such contention as here put forth by plaintiff-in-error. Indeed, as we view the law, this would leave this widow and these children without any remedy or any relief whatsoever.

It is suggested that, if this court should uphold plaintiff-in-error, the widow may again go before the State Industrial Board and apply to have the matter of an award reopened and the determination refusing it set aside and another now made.

Even if that were possible, and we think it is not, still what of the fact that defendant-in-error acted on this position and representation taken by plaintiff-in-error before the Industrial Board that this is a maritime case, acquiesced in that position both as to the law and the fact, com-

menced this action, and has with great trouble and expense litigated it thus far successfully.

However, even if defendant-in-error should, upon being defeated, here, go before said Industrial Board and make application to have the case reopened there, it is plain, we think, that neither has she the right to have the case reopened there, nor said Board the power to reopen it.

We have quoted from Sec. 20 of the local act, the provision making the decision of the board "*final as to all questions of fact* and, * * * *as to all questions of law*," except the right of appeal.

Also section 23 providing as follows:

> "An award or decision of the Board shall **be final and conclusive upon all questions** within its jurisdiction *as* * * * * *between the parties* unless reversed or modified on appeal therefrom as hereinafter provided."

The same section then provides that such appeal must be taken to the Appellate Division of the Supreme Court within thirty days. The state courts have held that it cannot be taken *after* the expiration of such thirty days (Pendergast v. Berrian, 184 A. D. (N. Y.) 240; Matter of Mc Guire, 202 A. D. (N. Y.) 1).

As we have said, no appeal was taken from the determination denying the award, and a year and a half has elapsed since.

In Clemens v. Clemens (180 A. D. (N. Y.) 92), it is settled and established in the courts of New York, that after the parties have permitted the time to appeal to expire without appealing, *none of such parties have the right to have the case reopened for a rehearing, nor has the Board the power to grant it.*

Conley v. Upson Co., 197 App. Div. (N. Y.) 815.

Matter of Southern Boulevard R. R. Co., 143 N. Y., 253.

People *ex rel.* Crane v. Hahlo, 228 N. Y. 309.

How can that right exist in face of the above quoted statutes making the decision final and conclusive between the parties? Certainly not because there has been any change in court decisions outside the case. There has been no other decision in the case before the Industrial Board, nor will the decision here be in that case whichever way it goes. In the Insana case it was different. There the case before the Industrial Board was taken up through the state courts and to this court direct.

There could be no contention here that there has been any change in the facts. Nor has there been any change in the decisions of this court affecting the case.

The decision cited by counsel for plaintiff-in-error in Vine v. West End Presbyterian Church, 19 St. Dept. Rep. 492 has been reversed (see Vine v. West End Presbyterian Church, 190 A. D. 886), and was, of course, the decision of an inferior tribunal to the Appellate Division of the Supreme Court which decided the Clemens case, *supra.*

At the utmost the power of the Industrial Commission, now called the Industrial Board, to reopen a case is discretionary, always. It has discretionary power to refuse to reopen a case (Schlenker v. Gargord Motor Truck Co., 183 (A. D. (N. Y.) 166).

If this court should reverse this judgment the Industrial Board would not be bound thereby to reopen the case even if it has the power to do so.

We take it this court will not feel like subjecting the rights of this widow and children to such hazards.

But the highest state court which has passed on the question has decided that this case cannot be reopened.

Of course, the soundness of this position is apparent. When the law grants to litigants the right of appeal it is a privilege which, if not

taken advantage of, as the law points out, the litigation must come to an end. Otherwise there could be no end to litigation in any matter of controversy.

Under the decision in Clemens v. Clemens, *supra*, therefore, the parties are now powerless to relieve themselves from the judgment denying an award, and the Board itself is powerless to grant any relief.

The Insana case is not illustrative of the situation in this case as claimed, for there the determination of the State Industrial Commission was reviewed here by certiorari.

Under sections 22 and 123 of said local act, had an award been granted and was still in force, the Board, *still having jurisdiction*, might review and modify it. Section 74 referred to by counsel has been repealed (Chap. 615 Laws, 1922). But as the award was denied and no appeal was taken within the time required, and the matter thus brought to an end, the Board now has no jurisdiction and the parties are without remedy insofar as any award of compensation is concerned (Secs. 20 and 23 local act; Clemens v. Clemens, *supra*).

Therefore, if this court should reverse this judgment the defendant-in-error, this widow and

these children, will be utterly without any remedy or any relief whatsoever.

It may be contended that in case this judgment should be set aside and the widow should return to the local Industrial Board and make application for a rehearing and the same should be denied, then, on the assumption that the case is not of such maritime nature as to exclude the local statute involved, she could take the matter up through the courts of the State of New York, and again come here by writ of certiorari.

In the first place, would it be just and proper to now put her to the expense and delay incident to that expediency in the present situation and history of the proceedings in the case or to deprive her and the little children of the damages awarded them *for the negligence* of the employer, the issue of the employer's choosing?

In the next place, such procedure could not be otherwise than futile for at best the matter is one of discretion with the Industrial Board (Schlenker case, *supra*), but the state courts and statutes have already settled that, and the question of the interpretation and construction of these local statutes and the conclusiveness of the determination of said local board are not Federal questions, and therefore, could not be brought to this court.

Not only this, but it is elemental that this court adopts the decisions of local courts in construing their own state statutes, and as to local questions, (Chicago Pneumatic Tool Co. v. Arnold, 282 Fed. 43; Burgers v. Seligman, 107 U. S. 20, 33).

Certainly the consequences of not appealing in the time prescribed and the power to reopen involve only local questions and questions of local practice which this court will not review.

Lee v. Cent. George Ry. Co., 252 U. S. 109.

So. Ry. Co. v. Carson, 194 U. S. 136.

Lee v. Cent. Georgia R. Co., 40 S. C. 254.

It has been urged by counsel for plaintiff-in-error in this case, quoting from Robinson's Elements of Juris Procedure, 183, that this court will:

> "Give it (any local statute involved) the same construction which it has received in the state of its enactment, and apply it as it would have been applied had the suit been prosecuted in the local courts."

Defendant-in-error now has a judgment for herself and children, the result of the very acts of plaintiff-in-error in getting the award denied before the local board on its claim that this is a maritime case, and this action is based upon such act, can plaintiff-in-error be now permitted to deny said act and thus defeat this widow and these children utterly by so doing? It pleaded for the

right and opportunity to contest the action on the question of its own negligence. Let it abide the result.

(2) The judgment of said local board is an adjudication binding upon the parties. Certainly it ought to be adopted as the law of the case for the purpose of this action.

We have referred to sections 20 and 23 of said local Act and the decisions of the state courts to the effect that such determination is final, conclusive, and binding, and left, except this action, no remedy but by appeal which was not and cannot now be taken. We have also called attention to the point, citing authorities holding, that this court will adopt the rulings of a local tribunal in construing local statutes when not violative of a Federal right. A construction of the local statute to the effect that denial of award is now final and conclusive on the parties and cannot be reviewed or reopened, does not involve a Federal right. Even the denial of the award was, primarily, the construction of a local statute.

The court said in the Gallagher case (282 Fed. 182):

> "We do not know upon what ground the writ of certiorari was denied in the Keator case (182 N. Y. A. D., 153; 224 N. Y., 540). It is conceivable, we suppose, that it may have been denied for the reason that the court did

> not feel it to be within its jurisdiction to determine whether the state court held its own statutes inapplicable to the facts of the particular case, although it might be erroneous, provided it did not deprive either party of a right to which he was entitled under the Constitution of the United States or under any act of Congress."

And denial of the award was an upholding and not a denial of a Federal right, made at the employer's own instance, and it cannot, therefore, now question such determination. This denial is not against but, insofar as it has any force or virtue in that respect, is for the jurisdiction of the lower court in this action. That was the only Federal right, if any, involved in the denial of the award, but neither party was deprived of, but both were granted it, the employer at its own request, the widow whether she wanted it or not. Surely the former should not now be heard to object.

(3) While counsel for plaintiff-in-error concedes that the application to the State Industrial Board to cancel and deny the award was made on the ground that by reason of the maritime nature of the case the local compensation act was excluded, nevertheless, it does not appear from the record what the ground was.

Standing strictly on the record we have, therefore, a ruling of the Industrial Board which might

be one of many grounds, all of which would give rise to local and not Federal questions, and the result would be a perfect right to maintain this action for damages for the tort whether it be a maritime or non-maritime case.

For instance, suppose the employment did not belong to one of the classes specified and defined in the local statute. Supposing the employee was not acting in the course of his employment. Supposing the plaintiff-in-error had not taken the proper steps to require exclusive application in a non-maritime case of the compensation act. In any one of these events, an award would have to be denied but the right to maintain an action at law would remain to the widow and children whether the case is maritime or non-maritime.

If we are to stand strictly on the record, therefore, the jurisdiction of the court below cannot be attacked.

POINT IV.

The judgment should be affirmed with costs and disbursements, and with damages as provided by subdivision 2, Rule 23 and Rule 38 of this Court.

Said Rule 23 provides as follows:

> "In all cases where a writ of error shall delay the proceedings on the judgment of the

> inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent in addition to interest, shall be awarded upon the amount of the judgment."

Rule 38 applies this rule to this writ of error.

Of course, this writ of error has delayed proceedings on the judgment. More than that, it has put defendant-in-error to a large expense in disbursements, expenses, and counsel fees which cannot be taxed in the ordinary course.

Then it may not be entirely foreign to the matter to consider that the *verdict should have been larger*. Intestate left a young widow and two small children. He was but twenty-seven years old, had an expectancy of over 37 years (pp. 16, 23 printed record) and was a competent, industrious, and very promising master iron worker, had but shortly attained to that, but, still, was earning at the time, $2000.00 a year (pp. 21, 22 id).

It seems clear for the following reasons that this is a proper case for the application of the above rules.

The maritime nature of the case such as to exclude the local Workmen's Compensation Law involved is and has been at all times so clear and so well settled by the decisions of this court, with

which counsel for plaintiff-in-error has been all the time familiar, that there can be no other reasonable conclusion than that this writ of error was sued out for delay. Certainly it plainly *so appears* and that is all the rule requires.

Assuming, however, that plaintiff-in-error might have been justified in bringing the case here had no other question except that based upon the maritime nature of the case been involved, still when we come to consider the fact that plaintiff-in-error claimed and represented before the State Industrial Board that the case was of such a maritime nature as to exclude said local statute, and procured an award under said statute to be denied on that very ground, thus inviting this action, and now, after defeat on the issue of its own choosing—its own negligence—depends in its effort to deprive the lower court of jurisdiction, on exactly the opposite claim; and, further, considering the gross negligence shown on the part of plaintiff-in-error in causing the death of intestate: there does not appear to be any excuse or justification for this writ, and, by suing it out plaintiff-in-error has placed itself in a position to justly deserve the full application of the rules invoked.

We, therefore, ask for affirmance and for an award in damages of ten per cent of the amount of

the judgment. The amount of the judgment is $14,915.88, ten per cent of which is $1491.58.

Texas & Pac. R. R. Co. v. Prater, 229 U. S., 177.

Deming v. Carlisle Packing Co., 226 U. S. 102.

Gibbs v. Dickma, 102 U. S. 410.

Respectfully submitted,

IRVING W. COLE,
Attorney and Counsel for
Defendant-in-error,
1005 D. S. Morgan Bldg.,
Buffalo, N. Y.